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160 - 30419

H. S. BENNETT, Doing Business as H. S. BENNETT COMPANY, Not Incorporated, Defendant in Error, vs. CHICAGO MOTOR CLUB, a Corporation, Plaintiff in Error.	ERROR TO CIRCUIT COURT OF COOK COUNTY.

244 I.A. 621

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover the value of certain services said to be rendered by him to defendant under an alleged verbal agreement. Upon trial the jury gave him a verdict of $734.23 and judgment was entered for this amount. By this writ of error defendant seeks a reversal. Plaintiff does not appear in this court to defend the judgment.

Plaintiff's claim was said to be for services in investigating the theft of an automobile and making a report on same, together with moneys advanced and expenses incurred in making the investigation, amounting to $1084.23. Defendant's affidavit of merits denied that it at any time engaged or authorized plaintiff to perform any work in and about the theft of an automobile or at any time requested plaintiff to perform any services whatever for defendant; denied that plaintiff had performed any such services or expended or advanced any moneys in connection with the alleged investigation; denied that he at any time performed any services for or on behalf of defendant, and denied that defendant owed him any money whatsoever.

We are of the opinion that the judgment must be reversed and the cause remanded on the ground that the verdict is clearly against the preponderance of the evidence.

The case for plaintiff was supported by the testimony

H. B. KENNETT, doing business as H. B. KENNETT COMPANY, NOW Incorporated, Defendant in Error, vs. CHICAGO MOTOR CLUB, a Corporation, Plaintiff in Error.	MEMOR TO DISCUSS SUITS BY CLAIM AGENTS.

244 I.A. 621

MR. MOULTRIE INSTEAD MEMORY

SUSTAINING THE MOTION BY THE COURT.

Plaintiff brought suit to recover the value of certain services said to be rendered by him to defendant under an alleged verbal agreement. Upon trial the jury gave him a verdict of $734.32 and judgment was entered for this amount. By this writ of error defendant seeks a reversal. Plaintiff does not appear in this court to defend the judgment.

Plaintiff's claim was said to be for services in investigating the theft of an automobile and making a report on same, together with expert advice and expenses incurred in making the investigation, amounting to $1034.32. Defendant's affidavit of merits denied that it was any fault of defendant that plaintiff is performing his work in and about the theft of an automobile or at any time requested plaintiff to perform any services whatever for defendant; denied that plaintiff has performed any such services or expended or advanced any money in connection with the alleged investigation; denied that he at any time performed any services for or on behalf of defendant, and denied that defendant owed him any money whatsoever.

We are of the opinion that the judgment must be reversed and the cause remanded on the ground that the verdict is clearly against the preponderance of the evidence.

The case for plaintiff was presented in the form of a

of himself and one other witness. Plaintiff was running a private detective agency in Chicago. These witnesses say that they went to the office of the defendant and there met a Mr. Jacks and a Mr. Brown, who, the witnesses say, were the claim manager and president, respectively, of the defendant; that they told Mr. Brown and Mr. Jacks that a certain automobile which had been insured by defendant had been hidden by Dr. Ramsay, the owner, for the purpose of defrauding the defendant, and plaintiff would be willing to sell this information to the defendant; that his charges would be a flat rate of $35 a day per man, including expenses, or "We will guarantee to return the car to you for a stipulated amount, or we do not want anything;" that Mr. Brown told them to go to work, which they did. They did not locate the stolen car and never found it. Plaintiff knew that the defendant corporation never issued or carried any insurance and that there was another corporation located in the same building which did issue automobile insurance, and that this latter company was entirely separate and distinct from the defendant company.

Mr. Brown, testifying for the defendant, said he was the general manager of defendant corporation and that it did not engage in insurance of any kind; that there was another corporation located in the same building which did issue automobile insurance; that the Mr. Jacks referred to was not an officer of defendant company, but was the claim manager of this insurance company; that he, Brown, never had any conversation with the plaintiff or his witness with reference to working for the defendant company and never had any conversation with anyone with reference to doing work in and about the loss of Dr. Ramsay's automobile, nor did he hire any detective agency with reference to finding said automobile, nor have any conversation with any detective agency with reference to that matter.

of himself and one other witness, Plaintiff was running a private detection agency in Chicago. These witnesses say that they went to the office of the defendant and there met a Mr. Jacks and a Mr. Brown, who, the witnesses say, were the claim manager and president, respectively, of the defendant; that they told Mr. Brown and Mr. Jacks that a certain automobile which had been insured by defendant had been hidden by Mr. Harvey, the owner, for the purpose of defrauding the defendant, and plaintiff would be willing to sell this information to the defendant; that his charges would be a flat rate of $50 a day per man, including expenses, or "he will guarantee to return the car to you for a stipulated amount, or we do not want anything" that Mr. Brown told them to do the work, which they did. They did not locate the stolen car and never found it. Plaintiff knew that the defendant corporation never issued or carried any insurance and that there was another corporation located in the same building which did issue automobile insurance, and that this latter company was entirely separate and distinct from the defendant company.

Mr. Brown, testifying for the defendant, said he was the general manager of defendant corporation and that it did not engage in insurance of any kind; that there was another corporation located in the same building which issued automobile insurance; that the Mr. Jacks referred to was not an officer of defendant company, but was the claim manager of this insurance company; that he, Brown, never had any conversation with the plaintiff or his witness with reference to working for the defendant company and never had any conversation with anyone with reference to being sent in and about the lake of Mr. Emmerich automobile, nor did he give any detective agency with reference to finding said automobile, nor have any conversation with any detective agency with reference to that matter.

Dr. Ramsay testified that he was the owner of the car in question; that he was a physician and surgeon; that the car was insured in the Inter Insurance Exchange, and was lost in May, 1921 and recovered in August, 1921, a month prior to the time plaintiff claimed he made his contract with the defendant; that the insurance company paid him for the loss of the car, but when the automobile was recovered and turned over to him he refunded the money to the insurance company. Dr. Ramsay also testified to an attempt of the plaintiff to extort $2,000 from him because of some alleged incriminating information relative to the loss of the car.

A police officer testified that he located Dr. Ramsay's car in Elgin, Illinois, by means of a telephone call received from the chief of police of Elgin; that he went there and recovered the car in August. There was further evidence tending to prove that it was recovered August 25, 1921, and brought back from Elgin the next day. Plaintiff claims that all the work which he did was during the month of September, 1921.

The mere recital of the evidence demonstrates that the verdict against the defendant was not justified. The defendant was not in the business of insuring automobiles and could have had no motive in making a contract with plaintiff to recover the stolen car. The fact that plaintiff alleges that his services were rendered some time subsequent to the recovery of the automobile is, to say the least, very singular and plaintiff's evidence in this respect is not convincing. Mr. Brown's categorical denial of the alleged verbal contract of employment is in harmony with all the circumstances.

There is also merit in the contention that there is no evidence to sustain the verdict of $734.33. The value of the alleged services was not in issue. Defendant denied that it

employed plaintiff. Under such circumstances plaintiff was entitled either to the amount claimed, $1084.23, or nothing, and a finding of any intermediate sum is virtually a finding that there was no such agreement as contended for by plaintiff. Dewes Brewing Co. v. Kerwin, 107 Ill. App. 620; Conrad Seipp Brewing Co. v. Peck, 85 Ill. App. 637.

The general manager of the defendant corporation attempted to testify that the Inter Insurance Exchange in the same building was organized for profit and dealt in automobile insurance. Objection to this line of testimony was sustained. Ordinarily, testimony as to a collateral matter is irrelevant, but under the present circumstances this testimony was permissible as tending to show that the contract of employment, if any, of plaintiff was not with the defendant company but with another corporation which dealt in automobile insurance. Evidence as to facts should not be excluded which raises a reasonable inference or presumption as to the matter in issue. When a fact is, in a legal sense, relevant to the issue, it is not to be excluded although apparently collateral. Stolp v. Blair, 68 Ill. 541; North Chicago Street Ry. Co. v. Cotton, 140 Ill. 486; Kevan v. Atlanta National Bank, 142 Ill. 302; West Chicago Street R. R. Co. v. Kennedy, 170 Ill. 308, and other cases.

It was also error, considering the character of the defense, to permit the plaintiff to testify that Jacks was the claim manager and Brown the president of the defendant corporation, authorized to make a contract of employment with plaintiff.

The court also improperly admitted testimony tending to intimate that the defendant's witness, Dr. Ramsey, had been involved in some criminal prosecution. Bartholomew v. People, 104 Ill. 601.

[illegible]

[illegible]

[illegible]

The court improperly gave instruction No. 3 on behalf of the plaintiff, which assumed as a fact that "the defendant had issued one of its policies against such theft." This assumption is squarely contradicted by the evidence of the case. Healy v. People, 177 Ill. 306; C. & A. R. R. Co. v. Rayburn, 153 Ill. 290.

There were other errors upon the trial which will hardly occur again.

For the reasons above indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett and Johnston, JJ., concur.

41 - 31153

SIDNEY SCHRAYER & COMPANY,
a Corporation,
Appellee,

vs.

HARRY KORSMAK,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

244 I.A. 621

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

On December 31, 1925, judgment was entered against defendant by confession for $2630.46 under a power of attorney in a judgment note. January 19, 1926, which was within the term at which judgment was entered, the defendant filed a motion to vacate and set aside this judgment, supporting the same by an affidavit. This motion was denied, and defendant appeals from the order denying his motion.

The plaintiff has moved this court to strike from the statutory record the motion of the defendant to vacate the judgment with the supporting affidavit on the ground that they are not preserved by any bill of exceptions, certificate of evidence, or stenographic report of the trial, wherein only they can be properly preserved for review.

It has been held in many decisions that such motions and affidavits have no place in the statutory record. Peter Hand Brewing Co. v. Manaeda, 210 Ill. App. 153; Fleckles for use of Greenbaum v. General Film Co., 189 Ill. App. 321; Kayles v. Chytraus, 175 Ill. 370; Horn v. Bau & Gintz, 63 Ill. 539; Patten v. Young, 233 Ill. App. 515; Tyner v. Real Institutes Co., 185 Ill. App. 551; Knickerbocker v. Ft. Dearborn Trust & Sav. Bank, 219 Ill. App. 409; People v. Cowen, 283 Ill. 308; People v. Kitscher,

301 Ill. 40; Young v. Jameson, 307 Ill. 71; People v. Levin, 318 Ill. 227; Lilly v. Lilly, 240 Ill. App. 488; People ex rel. Raftzger v. Arnett, 317 Ill. 425; People v. Nordmeyer, 305 Ill.289.

Defendant realizes that, as there are no formal proceedings in the Municipal court, defendant's affidavit becomes substituted for a pleading and is thus properly preserved for review by incorporating the same in the statutory record. This would be true if the trial court had given defendant leave to defend and had entered an order permitting the affidavit to stand as his affidavit of merits; but the motion was denied.

It is next said that under the amendment of 1911 of Section 81 of the General Practice Act, matters not properly in the record may be preserved either by bill of exceptions, certificate of evidence, or stenographic report of the trial, (Spiehs v. Insull, 278 Ill. 184) and that the "report of trial" includes all matters which were before the court. We do not so construe Section 81 as amended. This merely gives a choice of methods of preserving matters for review and is not intended to change the general rule that all matters not properly within the common law or statutory record must be otherwise preserved for review. People v. Kitscher, 301 Ill. 40; Miller v. Anderson, 269 Ill. 608; Village of Bradley v. N.Y.C.R.R.Co., 296 Ill. 383. In the last cited case the court said: "It is immaterial whether the method adopted to incorporate the proceedings in the record is by bill of exceptions, certificate of evidence, or stenographic record of the trial." This has been held so many times as to require no argument.

This is not an independent proceeding to vacate a judgment under Section 21 of the Municipal Court Act as considered in Imbrie v. Bear, 230 Ill. App. 188. This was a motion made within the term.

The motion of appellee to strike will be allowed.

This leaves nothing properly presented to us for review, and in this condition of the record the judgment must be affirmed. Schwartz v. Brinks Chicago City Express Co., 198 Ill. App. 381.

AFFIRMED.

Hatchett and Johnston, JJ., concur.

49 - 31167

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. SAM MOTLOW, Plaintiff in Error.	ERROR TO CRIMINAL COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant was charged with assaulting Ray J. Jicka with a deadly weapon and upon trial by jury was found guilty and sentenced to ninety days in the county jail. He seeks a reversal.

A petition for change of venue was denied, and this action of the trial judge is assigned for error. No valid reason is presented why the petition should not have been granted. The only reply made by the State is that neither the petition nor the evidence to support it is preserved by bill of exceptions, but this is an error; they are properly preserved by bill of exceptions.

The assault occurred on the evening of October 17, 1925. It is not claimed that defendant himself committed the assault, but it is said that he was an accessory before the fact and therefore guilty as a principal. Defendant is a police officer of the Village of Lyons. On the evening of October 17, 1925, at about eleven o'clock, he and another officer, Duffek, then on duty, received a telephone complaint of a disturbance at a soft drink parlor called Zetlouka1's place. The two officers went to investigate. Defendant Zetlow was in uniform and wore a police officer's star.

The evidence as to the nature of the disturbance is somewhat confusing, but apparently the complaining witness Jicka with two other men were in Zetlouka1's place collecting evidence

concerning liquor law violations. The police officers were told that some persons were exhibiting guns. They saw some people standing in front of Zetloukal's and commenced to search them for guns. At that time Jicka and his two companions came out of Zetloukal's and the officers searched them for weapons.

The complaining witness, Jicka, says that the defendant, Motlow, asked him his name, which Jicka gave him. That he then noticed "from the corner of my eye" that the defendant "pointed with his thumb to a fellow directly behind me," and that the latter grabbed Jicka by the shoulder and that he was struck in the face with a gun or blackjack.

The witness Moore, who was one of the men with Jicka, said that as Jicka walked over and opened the door of his automobile some man - not the defendant - struck him; that he did not hear the defendant say anything. That he did not see what the defendant was doing.

The other man with Jicka testified that he did not know who struck Jicka nor how he was struck, and that he was not positive where Motlow was when the assault occurred; the last time he saw the defendant he walked across the street about five minutes before Jicka was struck.

Three witnesses and the defendant testified that the defendant left the scene before Jicka was struck. The defendant and Duffek searched everybody around there, and that the officers left before Jicka was struck. It was Saturday evening and, as usual at this time, there were a great many people around there talking loud. It was a dark night.

Motlow testified that he was a police officer; that he was on duty this evening. He and Sargeant Duffek responded to the call and were told that there were some fellows over there with guns; that he searched a bunch of fellows but found nothing; that

he and Duffek then left and drove to the station where they reported what they had done; that after he had been to the station about ten or fifteen minutes a call came in saying that somebody had been slugged; that they then went back to Zetlouka1's place, but found nothing. Defendant says that he did not see Jicka slugged that evening; that he did not know him before that evening; he denies that, after searching the men, he pointed with his thumb towards Jicka or by any gesture directed attention to him. He did not see anyone struck there that evening.

The evidence is too tenuous to support the verdict. It is hardly credible that Jicka could see defendant make a motion with his thumb on such a dark night. He is the only one who testified to any gesture by the defendant indicating Jicka as one to be assaulted. Jicka's own companions say that they saw nothing of the sort, and except for Jicka nearly all the witnesses testified that the assault took place after the defendant had left the scene. The verdict not only did not establish defendant's guilt beyond a reasonable doubt, but it was manifestly against the weight of the evidence.

Complaint is made of the action of the court with reference to giving and refusing instructions. Some of the refused instructions might well have been given, but we do not think it necessary to particularize as to these. Upon a second trial, if there should be one, such errors will not be likely to occur.

The proof failed to sustain the charge, and the judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett and Johnston, JJ., concur.

73 - 31197

PEOPLE OF THE STATE OF ILLINOIS ex rel. SERAFIN GOLIAK, Appellee, vs. WILLIAM E. DEVER, Mayor of the City of Chicago, AL. F. GORMAN, City Clerk of the City of Chicago, THOMAS P. KEANE, City Collector of the City of Chicago, and MORGAN A. COLLINS, Superintendent of Police of the City of Chicago, Appellants.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

244 I.A. 621

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from an order entered upon a petition for mandamus on behalf of Serafin Goliak for the transfer of a retail beverage dealer's license. The cause was heard by the court, which found the issues for the relator and entered its order and judgment directing that the writ of mandamus issue against the respondent William E. Dever, Mayor. The appellee does not appear in this court to defend this judgment.

Several points are made by the defendants, but one is sufficient to justify a reversal. There is a fatal variance between the relief sought in the relator's petition and the judgment entered.

The relator asserted that he bought a certain place of business and afterwards applied for a transfer of the license, that William E. Dever, Mayor of the City of Chicago, refused said transfer of license to petitioner and the petition prayed that the writ of mandamus be issued directing Dever to grant said transfer of license. The judgment orders that the writ of mandamus issue

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[illegible]

[illegible]

against William E. Dever, Mayor, and "he is hereby ordered to issue a Retail Beverage Dealer's License, Class 'A' to Serafin Goliak."

This judgment was erroneously entered. The petition does not allege that the petitioner ever applied for a retail beverage dealer's license, and no facts are set forth therein to establish his right to any such license. The petition is predicated solely upon the demand and refusal to transfer a retail beverage dealer's license. The judgment is not responsive to the issue made by the petition and answer. It is well established that a judgment must conform to the allegations of the petition and proof, and that a material variance between the relief sought and that awarded is fatal to the judgment. Belford v. Woodward, 158 Ill. 122; Marty Bros. v. Polakow, 151 Ill. App. 199; Glos v. O'Brien Lumber Co., 183 Ill. 211; Monarch Brewing Co. v. Wolford, 178 Ill. 252; Gutsch Brewing Co. v. Fischbeck, 41 Ill. App. 400; Quinn v. McMahan, 40 Ill. App. 593.

For the above mentioned reason the judgment is reversed.

REVERSED.

Matchett and Johnston, JJ., concur.

104 - 31233

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. ALLAN VERNIL, Plaintiff in Error.	ERROR TO THE MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McGURSKY DELIVERED THE OPINION OF THE COURT.

By information it was charged that the defendant with an automobile wilfully and maliciously made an assault upon Dononick Cusamano with intent to inflict upon him bodily injury. Upon trial by the court defendant was found guilty and fined $25. He seeks the reversal of this judgment.

The accident happened on June 17, 1926, at about 9:30 o'clock in the evening, at the intersection of Langley avenue and 75th street in Chicago. Defendant was going south on Langley avenue driving an automobile, and Cusamano was going east on 75th street on a motorcycle.

Cusamano testified that as he approached the intersection he was going at the rate or ten or fifteen miles an hour, when suddenly the defendant shot in front of him at the rate of seventy-five miles an hour without sounding any gong or signal or giving any warning; that the traffic at the intersection was "pretty heavy," which prevented him from seeing the defendant's car. "It was not very light," although the street lights were lit. Cusamano's motorcycle struck the automobile and he was thrown to the ground and injured. On cross-examination he said that the defendant was about four or five feet away from him when he first saw him and that he was unable to state how fast the defendant was going.

The defendant testified that he was going south on Langley avenue at about ten or fifteen miles an hour; that when he came to 75th street he came to a "near stop" and looked first west and saw nothing except something nearly a block away moving eastward; that it was quite dark at the time and he could not see how fast it was coming; that he saw an automobile coming from the east and put his car into second gear and cleared it; that when his driver's seat was about on the southerly street car track he again looked west and saw a motorcycle about ten feet away going what he considered "pretty fast"; that he stepped a little harder on his automobile to get over, but his machine did not pick up fast and it was struck by the motorcycle on the side; that after the accident he stopped his car and saw Cusamano on the pavement and a man picking him up; that he then went to the drug store on the corner and called up the police department, and then asked for the names of some witnesses. He remained on the scene of the accident until the police came.

There was other evidence tending to show that the street intersection was not well lighted.

The facts in this case come squarely within the decisions in People v. Adams, 289 Ill. 339; and People v. Anderson, 310 Ill. 389. It is not the law that a person is criminally liable for every act of mere negligence. Reckless and wanton negligence, as applied to the running of motors and vehicles, implies a positive disregard of the rules of diligence and a reckless heedlessness of consequences. Ordinary negligence merely denotes a negative quality in a person in attending or discharging a duty.

Assuming that the collision took place because of the negligence of the defendant, the evidence does not prove more than this. The only evidence tending to show recklessness was the statement of Cusamano that the defendant's car was running at the rate of seventy-five miles an hour, but he subsequently admitted that he

The defendant doesn't deny that she was getting drunk on Saturday evening at about 9pm or 10pm while on leave; that she had been in TRS uniform in order to a "dress ship" and looked fully over and was nothing unusual accompanying nearly a block away neither conceded; that it was quite dark at the time and he could not see her face; it was impossible seeing from the car and yet his car lamps showed clear and distinct it; that when his driver's seat was about on the nearside approx one crash he could hardly have not saw a motorcycle about ten feet away going was so described "pretty fast"; that he applied a little brake on the assumption to get away, but his machine did not pick up that did it was thrown up the nearside of the road; that after the accident he noticed the motorcycle was lying on its side and a man picking it up; that he then went to the dog which he saw runner and helped to the police headquarters, and then helped the dog home of most intoxicated. He thought he was aware of the nature of the offence with the police man.

There was ample evidence tending to show that the alleged intoxication was not well founded.

The facts in this case have been recently stated in [illegible] v. Atkins, [illegible] 1K. 1[illegible]; and [illegible], [illegible] 1K. 1[illegible]. It is not the fact that a person is actually liable for being out of their sobriety. Whether one motor negligence, or either in the exercise of driving the motor, causing a serious injury to the person of [illegible] and a motor manufacturer or manufacturer. Drivers accidents merely remove a negative liability in a person in attempting to discharge a duty.

Reading the evidence then given before the magistrate of the defendant, the evidence show the above was the [illegible]. The only criminal liability is when accidentally or negligently [illegible] the motorcycle was being handled at the time of [illegible] or not. It is accordingly contended that the

was unable to state how fast it was going. We must therefore accept the testimony of the defendant that as he approached Langley avenue he was going only ten or fifteen miles an hour. The darkness and traffic evidently prevented either party from seeing the other in time to avoid the collision. The defendant's conduct after the accident also negatives any wanton or malicious intention on his part. He stayed on the scene and telephoned to the police department, reporting the accident and remaining until the police appeared.

We should not be understood as holding that the collision occurred solely through the negligence of the defendant. We are expressing no opinion on that point. We do hold that the evidence fails to prove the charges in the information, namely, that defendant under the circumstances showed "an abandoned and malignant heart" and "unlawfully, wilfully and maliciously" made an assault in and upon one Domenick Cusamano with intent then and there to inflict upon the person of said Domenick Cusamano a bodily injury.

The judgment is therefore reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

Matchett and Johnston, JJ., concur.

104 - 31233 FINDING OF FACT.

We find as an ultimate fact that the defendant did not on the 17th day of June, A. D. 1926, at the City of Chicago, in said State of Illinois aforesaid, with a certain instrument commonly called an automobile, said automobile being a dangerous and deadly weapon, without any considerable provocation whatever, and under circumstances showing an abandoned and malignant heart, unlawfully, wilfully and maliciously make an assault in and upon one Demonick Cusamano with intent then and there to inflict upon the person of said Demonick Cusamano a bodily injury, contrary to the Statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois.

113 - 31242

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. RICHARD E. PARKER, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Mary Hampton filed a complaint charging defendant with wilfully and unlawfully keeping and carrying on an employment agency in the City of Chicago without first procuring a license so to do from the State Board of Commissioners of Labor. Upon trial by the court he was found guilty and fined $200 and costs. He seeks a reversal.

The abstract does not purport to contain all the evidence heard on the trial. We must therefore presume that the evidence, if completely abstracted, would sustain the judgment. People v. Koslowski, 315 Ill. 104; Glos v. Shadd, 218 Ill. 209; People v. Kichoff, 286 Ill. 103. A reviewing court will not examine the record in order to reverse a case, since the abstract must contain sufficient evidence to justify the court in such reversal. McGovern v. City of Chicago, 202 Ill. App. 139; Kiepkowski v. Bostrom, 179 Ill. App. 73.

Mary Hampton, the complaining witness, testified that she saw a sign over the defendant's office which said "Jobs." She told Parker that she was looking for a job, and defendant told her if she gave him $5 he would put her to work in the morning; that he gave her a paper to sign, which she signed (this paper does not appear in the abstract); that she did not get a job, and he again promised to get her a job, but she neither got a job nor her money back.

Thomas Bouchier, an inspector of private employment agencies, called upon defendant's place of business and made a request that the complaining witness' money be repaid to her. Defendant told the agent to get out. On the inside of defendant's place of business was a large placard stating persons were wanted for different kinds of work. Defendant told Bouchier that he was the president, secretary, treasurer, and everything that went with the concern. Bouchier testified that Parker had no license.

It is conceded that defendant had no license, but he claims that he was acting for a corporation which secured jobs for members only; that the name of the corporation of which he was president and general manager was the American Unity Welfare League and Labor Union, and that Mary Hampton paid her five dollars to join the organization; that he was acting for this corporation and not as an individual. The trial court was evidently of the opinion that this alleged corporation, the existence of which does not appear to be proven, was merely a disguise by which defendant carried on the business of an employment agency. The record before us amply justifies this conclusion.

It is said that defendant is charged with one offense and found guilty of another. The abstract says that the court found the defendant "guilty in manner and form as charged in the information." We do not understand the basis of the contention that there is a variance between the judgment and the charge.

It is asserted that the fine is excessive, but there is no evidence to support this. The court might well believe that the defendant's alleged corporation was merely a blind to conduct an employment agency through which he might fleece ignorant and unsuspecting people.

The judgment is affirmed. AFFIRMED.

Matchett and Johnston, JJ., concur.

137 - 31267

R. J. DWYER, Trustee, Appellant, vs. ROYAL INDEMNITY COMPANY OF NEW YORK, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO. 244 I.A. 622[3]

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks a reversal of an adverse judgment in a case tried by the court, in which plaintiff sought to recover on a burglary insurance policy issued by the defendant. Plaintiff Dwyer is the trustee for the benefit of the creditors of the Cooper & Pollock Bootery, a partnership composed of Bert E. Pollock and Benjamin Cooper, hereinafter called plaintiffs, engaged in the retail shoe business at 5610 West Madison street, Chicago.

Plaintiffs claim that a burglary was committed on said premises on May 18, 1925, by reason whereof they suffered a loss in merchandise to the amount of $4791.10, for which defendant, under the terms of its policy, is obligated to indemnify them. The defendant denied that any burglary took place as claimed and denied that the plaintiffs kept books and accounts as required by the policy as a condition of liability. Upon the trial the court was evidently of the opinion that the alleged burglary was not genuine and also that the insured had not kept the required books of account so that the exact amount of loss could be accurately determined, and found for the defendant. We are of the opinion that the evidence justified this conclusion.

Was there a real burglary? The partners, Pollock and Cooper, were conducting a losing business in the spring of 1925

[illegible] - [illegible]

[illegible]

[illegible]

[

and their creditors were continually pressing them for money. On April 15th business was so poor that after consulting with their largest creditor they determined to liquidate their business and sell the stock of goods on hand. On April 29th they procured from the defendant the burglary insurance policy upon which this suit is based. A closing out sale was commenced about May 1st and continued until May 18th. It was claimed that on this night or the morning of the 19th the burglary occurred, in which about eleven hundred pairs of shoes were stolen by burglars.

The store was equipped with a Reliance Alarm system, which consisted of a twelve inch gong located on the outside of the store over the front show window. The windows and glass door were lined with tinfoil in such a way that the breaking of the glass completed an electrical contact which caused the gong to ring. There was a switch, for turning this alarm on and off, near the rear door of the store, about forty feet from the front of the building. The front door was on the left side, in a sort of entrance, about four feet deep. To the right of the door, and extending to the main front window, was a smaller show window with a glass about eight feet high. Back of this window was a display space separated from the rest of the store by a wooden partition, in which there were two small doors opening into the store room, which were fastened on the inside or store side of the partition by catches.

Pollock testified that he closed the store at ten o'clock on the evening of May 18th; that he locked the back and front doors, turned on the burglar alarm switch and turned off the lights; he knew the alarm system was in working order; that when he reached the store about nine o'clock the next morning he found a hole in the glass of the small show window, to the right of the front door, and a brick lying on the floor of the show

and their artillery were so obviously covering them (or gunner).
The Devil Dog Dunlapp was so poor that after supplanting with
their Sergeant position they determined to Dunlapp their business
and sell the stock of grain on hand. On April 20th they procured
from the Governor the Dunlapp Government policy upon which this
must is based. A standing out and was commenced about the 1st and
continued until May 18th. It was claimed that on this night or
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window with broken glass on the entrance floor and the inside of the window; that the hole was jagged, about a foot and a half square and two and a half feet from the ground. He found the burglar alarm switch turned off, the back door open, and the shoes missing. The shoes had been taken out of the boxes but most of the boxes were in their places on the shelves, although some were on the floor. He notified the police.

Pauley, the janitor of the building, testified that he swept the sidewalk in front of the store at seven o'clock on the morning of May 19th; that he noticed a sales sign in the small show window and stopped to read it, and that the glass in that window was not broken at that time; that he swept out the entrance and was within a few inches of that window. After finishing he went home for breakfast and returned about nine o'clock; he then noticed the sign was off and a hole had been cut in the glass as if it had been cut by a glass cutter; that it was a square hole, one side of which was jagged. That he went into the store and talked to Pollock and a Mr. Simonson who was running the sale for the partners. Pollock told Simonson to give Pauley a pair of shoes which was done, Simonson saying, "If anybody comes around and asks you what you seen, tell them no, you didn't see anything." Pollock was standing right beside him when this was said.

Kuhs was a baker whose shop was four doors from plaintiffs' store. He testified that he was working in his bakery from twelve midnight of the 18th until twelve o'clock noon of the 19th; that he was in the back part of the bakery with another man. They had a dog tied to the back door. All the doors of the bakery were open. They worked about fifteen feet from the back door. None of the machinery was running, and the witness' hearing was good; he did not hear or notice anything unusual that night or morning. That it was necessary to pass his shop in order to get from the rear door of plaintiffs' store

to the alley; the passageway was too narrow for an automobile to pass; that he heard no gong.

Collis testified that he and his family lived directly above plaintiffs' store; that he was home from 10:30 p. m. on the 18th until about 7:00 a. m. on the 19th. He slept in the front room. He did not sleep very soundly. He heard no gong sound nor did he hear anyone walking in the store below. When he left about five or ten minutes after seven in the morning he saw Pauley sweeping the sidewalk.

Officer Burke testified that none of the catches on the partition doors from the window to the store was broken. The back door was open, but there were no marks of force on it. He testified that he thought that a man would be taking a great chance to get through that hole in the window. The empty shoe boxes, with the exception of a few, were in order on the shelves.

Another officer testified that prior to the 18th of May he suggested to Pollock that he leave a light in his store at night so that police officers could see if anybody was in there, to which Pollock replied, "I should worry. I am covered by insurance."

Pollock's testimony was contradictory in many respects. For instance, he stated that as soon as he came to the door he noticed the window was broken, although in the statement which he signed just after the alleged burglary he said he opened the store in the usual way and did not know that there was anything wrong until he went to turn off the alarm and saw that the store was littered with boxes. That he then investigated and found the window had been cracked.

It is highly improbable that a burglar would cut a hole in the glass window or could have crawled through a hole placed as this was and so small. Also, how could he get into the

store through the partition doors between the show window and the store room without breaking the catches? From Pauley's undenied evidence, the alleged burglary must have taken place in daylight between 7:30 and 9:00 o'clock in the morning. It is incredible that burglars could in this short time have removed over one thousand pairs of shoes from their boxes or would have replaced the boxes on the shelves or could carry the shoes away through the back door without the neighboring baker or his helper knowing anything about it.

From these and other circumstances we cannot say that the conclusion of the trial court that there was no genuine burglary was manifestly contrary to the evidence.

The policy did not cover loss "unless books and accounts are regularly kept by the insured and are kept in such manner that the exact amount of loss can be accurately determined therefrom by the company." That such a condition is a reasonable one and that the failure of the insured to comply with it will relieve the company from liability, has been held in German Insurance Co. v. Bates & Co., 67 Ill. App. 370; Merchants National Insurance Co. v. Dunbar, 88 Ill. App. 574; Niagara Fire Insurance Co. v. Forehand, 169 Ill. 626; see also 14 R. C. L. 1140.

Plaintiffs kept no inventory records whatever nor any other books from which the exact amount of loss on May 19th could be accurately determined. There was an attempt to obviate this failure by introducing a so-called balance sheet or financial statement, but it was shown that this statement was made and given to the Flersheim Shoe Company for the purpose of obtaining credit. Furthermore, it was dated May 1st and not May 19th, the date of the alleged burglary. All original sales slips from the cash register and all invoices were destroyed by Pollock and he was

unable to produce any of them at the trial. He admitted that the books contained only figures and did not tell in detail "what the stuff was." The court was justified in concluding that the plaintiffs did not keep the required books and accounts.

Counsel for plaintiffs complain that their motion for a non-suit should have been allowed. Such a motion should have been made before the court stated its finding. Municipal Court Act, chap. 37, sec. 413 (Cahill); Weiss v. Corr, 203 Ill. App. 261; Kelly v. Chicago City Ry. Co., 202 Ill. App. 239; Springer v. Campbell Co., 174 Ill. App. 278; Daubs v. Auspenheimer, 272 Ill. 350. The record here shows that the plaintiffs' motion for a non-suit was made too late.

The judgment is correct and is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

167 - 31298

MORRIS FELDMAN, NATHAN R. FELDMAN,
DAVID I. FELDMAN and ABRAHAM FELDMAN,
Doing Business as M. Feldman & Sons,
Appellants,

vs.

JACOB SCHUMAN,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an attachment suit tried by the court, which found for the defendant. Plaintiffs appealed from the judgment on the finding.

The affidavit for attachment alleges that defendant owed the plaintiffs $174.50 for goods sold and delivered and that the place of residence of defendant was Philadelphia, Pennsylvania, and that said defendant has departed from this state with the intention of having his effects removed, and that he is about to remove his property from this state, to the injury of the plaintiffs. Defendant filed no plea traversing the allegations of the affidavit.

The case was tried in a loose manner. Defendant admitted that he owed plaintiffs the amount claimed and apparently the only contest was as to the attachment.

Plaintiffs' attorney in his brief says that the judgment must be reversed for the reason that as defendant filed no plea traversing the facts stated in the affidavit upon which the attachment issued, such facts are therefore admitted. Chap. 11, Sec. 27, Ill. Stat.; Gums v. Lincoln Stars, 209 Ill. App. 420; Lloyd v. Lincoln Stars, 209 Ill. App. 421.

Defendant's brief makes no attempt to controvert this

point. All the cases cited by him are cases where a plea was filed by the defendant. As the point of plaintiffs is apparently conceded, the grounds stated in the affidavit for attachment must be considered as admitted.

The judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett and Johnston, JJ., concur.

195 - 31327

JACOB MEELBUSCH, Appellee, vs. HENRY A. MEELBUSCH, Appellant.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from an adverse judgment for $5572 in an action brought on a check for $4400 drawn by him and cashed by plaintiff. The verdict of the jury was for the amount of the check with interest.

Plaintiff declared on the common counts, to which defendant filed a plea of the general issue and also asserted that the check was given to plaintiff as consideration for an illegal transaction, and filed a plea of set-off, claiming that he had made loans to the plaintiff after his check was cashed aggregating more than the amount of this check.

Defendant's counsel asserts that this is a controversy between brothers, and that the transactions between them arose out of unlawful deals in liquor. They are described as "bootleggers." Plaintiff testified that he received the check from his son (defendant's nephew) and a man named Getty, a "bootlegger," and that he took the check down to the bank and got it cashed and paid the money over to Getty; that he cashed the check because his son told him that the defendant said he should cash it; that he asked why the check was not made out to Getty and was told that defendant did not want Getty's name on the check; that he, the plaintiff, knew what Getty's business was at the time he took the check.

APPEAL FROM DUPLIN COUNTY.

244 I.A. 623

MR. SUMMERING JUSTICE MCKENNEY

DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in favor of plaintiff in an action brought on a check for $1875 drawn by him and cashed by plaintiff. The verdict of the jury was for the amount of the check with interest.

Plaintiff resided on the common commons, on which defendant filed a plan of the general issue and also asserted that the check was given to plaintiff as consideration for an illegal transaction, and filed a plea of set-off, claiming that he had made loans to the plaintiff after his check was cashed aggregating more than the amount of this check.

Defendant's counsel asserts that this is a controversy between brothers, and that the transactions between them arose out of winnings during in liquor. They are described as "bootleggers." Plaintiff testified that he received the check from his son (defendant's nephew) and a man named Betty, a "bootlegger," and that he took the check down to the bank and got it cashed and paid the money over to Betty; that he needed the check because his son said he was the defendant and it was up to him to cash it; that he asked the clerk if the check was good and was told that interest had not been paid; that he, the plaintiff, knew that Betty's business was of his time be that the check.

195 - 31327

JACOB MEELBUSCH, Appellee, vs. HENRY A. MEELBUSCH, Appellant.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from an adverse judgment for $5572 in an action brought on a check for $4400 drawn by him and cashed by plaintiff. The verdict of the jury was for the amount of the check with interest. The plaintiff does not appear in this court to defend his judgment.

Plaintiff declared on the common counts, to which defendant filed a plea of the general issue and also asserted that the check was given to plaintiff as consideration for an illegal transaction, and filed a plea of set-off, claiming that he had made loans to the plaintiff after his check was cashed aggregating more than the amount of this check.

Defendant's counsel asserts that this is a controversy between brothers, and that the transactions between them arose out of unlawful deals in liquor. They are described as "bootleggers." Plaintiff testified that he received the check from his son (defendant's nephew) and a man named Getty, a "bootlegger," and that he took the check down to the bank and got it cashed and paid the money over to Getty; that he cashed the check because his son told him that the defendant said he should cash it; that he asked why the check was not made out to Getty and was told that defendant did not want Getty's name on the check; that he, the plaintiff, knew what Getty's business was at the time he took the check.

It is claimed that this transaction arose out of the "bootlegging" business and that it was reversible error for the court to prevent the cross-examination of plaintiff as to his knowledge of this fact. This examination should have been allowed.

The defendant testified that he loaned various sums to the plaintiff, aggregating $4400, which were never repaid, and supported this by introducing checks given to plaintiff. Plaintiff says that he was "pretty sure" these checks were for merchandise which he had sold his brother. To negative this, defendant testified that he had given plaintiff a number of other checks for various sums, which were for merchandise, and offered such checks in evidence, which he said contained notations which distinguished them from the checks given to plaintiff for loans; but the court refused to allow these checks alleged to be for merchandise to be introduced in evidence.

These checks should have been admitted and the defendant permitted to testify as to how he identified them from the checks alleged to be given to plaintiff for loans. This would have tended to support defendant's plea of set-off and also to refute plaintiff's denial that he was in the liquor business.

For the reasons above indicated, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett and Johnston, JJ., concur.

204 - 31336

FRANK KRAUSE,
Complainant,

vs.

VERONICA KRAUSE,
Defendant.

VERONICA KRAUSE,
Cross-Complainant,

vs.

FRANK KRAUSE,
Cross-Defendant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

244 I.A. 623

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal by Veronica Krause from an order denying the prayer of her petition, in which she asks that Frank Krause, her former husband, be held in contempt for failure to pay arrearages amounting to some $3,000 awarded to her by a decree of divorce for the support of two minor children. He replied by affidavit to the cross-complainant's petition and the court after hearing evidence entered its negative order.

The parties were married in April, 1910, and lived together until June, 1917. Two children were born to them, and were fourteen and twelve years old respectively at the time of the hearing of this petition. In June, 1917, Frank Krause joined the United States Navy and was in this service until August 25, 1919. When he sought to return to his wife he found that she had moved from their old address and was openly living and cohabiting with one Mike Muloc. He thereupon filed a bill for divorce against her, charging adultery. By subsequent agreement of their respective attorneys and in order, he says, not to cause

any scandal to his minor children, Mrs. Krause filed a cross-bill and procured the divorce with the understanding that no support should be asked for herself. The decree was entered June 18, 1920, and $10 a week was ordered to be paid for the support of the two children.

Mrs. Krause was married to Mike Kulec in 1920, and has had the children in her custody all the time. Frank Krause has remarried and has two children by his second wife. He testified that he earned from $90 to $135 a month, and that he has no savings; that he worked as gardner. There was also before the court a report criticising Mrs. Kulec's reputation for honesty and her conduct as a mother.

The chancellor was evidently of the opinion that under all the circumstances the petitioner had not shown that Frank Krause had wilfully refused to comply with the decree with reference to the payments to be made thereunder. We are of the opinion that the evidence justified this conclusion, and the order appealed from is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

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any monies to the above relatives, etc, Edward Lind a major, LLI was promoted his rights upon the insurance, thus an account should be added for Barnhill. The income was endorsed June 17, 1870, and all a week was ordered to be paid for the account of the children.

Mrs. Brown was entitled to this value to life, and has had the milliman in her custody all the time. Frank Brown has remarried and has two child from by his second wife. He testified that he mortgaged from 800 to 8000 a month, and then he saw no evidence that he ever from 800 to 8000 a month, and then he saw no evidence that he ever from 800 to 8000 a month. Frank was also faithful the court a trusty intimidating etc. Elmer's reliability of testimony and her memory as a witness.

The defendant was willingly at the opinion that under all the circumstances the judicial has not taken from Frank Brown the fidelity relied to provide all the further this relationship is its property to be made otherwise. So has at the evidence that the estate is partition this intimidation. All the other monies received from it affidavit.

Attorney.

Edward and Samuel, Jr., Jones.

235 - 31367

THE RUDOLPH WURLITZER COMPANY, a Corporation, Appellee, vs. LILYAN WALKER, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff took judgment by confession against defendant on a promissory note with a power of attorney signed by her. On motion she was granted leave to defend, the judgment to stand as security. Upon trial by the court the judgment for $1644.13 with attorneys' fees of $149.47 was confirmed. From this defendant appeals.

Defendant's note was given plaintiff as part of the purchase price of a piano and her defense is (1) that there was a breach of the implied warranty that the piano should be reasonably fit for its purpose; (2) that the contract of sale was subject to her approval within thirty days; and (3) that there was an independent contract to rescind the transaction.

Mr. Fenton was employed by plaintiff as a salesman. In July, 1925, he was in charge of a branch of plaintiff's business located near defendant's residence and called upon her and negotiated a sale of and delivered a grand piano to her subject to her approval. This piano proved unsatisfactory because of its size, and defendant requested its removal and the same was removed. August 10th Mr. Fenton took the defendant to the Wabash avenue store of the plaintiff where there was a wider selection of pianos. Defendant had no experience in musical

instruments of that kind, did not play the piano and had never owned a piano before. She selected one which seemed satisfactory and Fenton told her that if it should not be satisfactory it might be returned. With that understanding she paid $190 on account and executed the note in question, secured by chattel mortgage on the piano.

Defendant says that a day or so after the piano was delivered it sounded "loud and bangy." Thereupon she called Fenton by 'phone and he promised to send a tuner, saying it was always necessary to tune an instrument of that kind with reference to the room in which it was used. It was still unsatisfactory and Fenton sent a factory expert to put it in order, but this failed and defendant requested that the piano be removed. Fenton asked leave to have the piano remain in defendant's apartment and that he be permitted to bring prospective purchasers to the apartment. Such leave was granted and prospects were brought by Fenton to the apartment to examine the piano. Fenton then examined the instrument and stated that he "didn't realize what bad shape the piano was in; I couldn't sell that piano in that condition," and that he would have it returned to the plaintiff.

A Miss Hartman, who was a professional musician with fifteen years' experience, testified that she examined the piano and that the tone was lacking in "quality and beauty;" that the "tone is dead. It has no resonance or overtone. *** I don't think tuning would improve the quality of the tone. ** It would appear to me that the action of that piano was among the cheapest I have ever tried. I mean the cheapest in price and the poorest in quality. ** Some of the keys would stick." In a good piano after you strike a key you hear the ring for a certain length of time. "This was like a thud." She testified that she heard this piano before and after it was tuned. "I would rank the piano as one of the cheapest I have heard."

instruments of that kind, did not play the piano and had never owned a piano before. She had spent one week second anniversary and Peter said that week if it should not be satisfactory it might be returned. He's that understanding who yield GOOD on Saturday and exceeded the same in quantity, measured by the full measure on the piano.

Delighted were that a day or so after the piano was delivered it broke "BLOW and Bunny." Neighbors who called Fredda by phone and be provided to send a tuner, saying it was always necessary to tune an instrument of that kind with reference to the room in which it was used. It was still unsatisfactory and Fredda had a factory expert to put it in order, but this failed and calculated indicated that the piano be returned. Fredda sent Lizzie to fetch the piano through the delivery-man's department and that he to provided it taking in exchange another to the satisfaction. Such time was and arrangements was brought by Fredda to the apartment to overlook the piano. Peter then examined the instrument and which that in "it's perfect what had things the whole was in; I wonder's not that along it that don't know," and that he would have it returned to the dealerhouse.

[illegible] "I know Hoffman, who was a professional musician with Fifteen years' experience, insisted that she examined the piano and that the tone and feeling is "quality and beauty" that can "take to dead." It has no resonance or overtone. Now I say that tuning would improve the quality of the tone. We to well'' anyone to do that the notion of that piano was among the changes I have ever which. I will not [illegible] to allow the [illegible] in health. [illegible] Some of the keys really stick." In a good piano after you notice a lot you have the ring for a certain length of time. "Only one like a true." The feeling that you [illegible] this piano tones and other is was round. "I would [illegible] piano so out of the [illegible] I have heard."

Martin Marvinac, a piano tuner of thirty years experience, examined the piano with two men from plaintiff's office. He says the piano "lacks quality in tone;" that "it has all the parts necessary to make an instrument, but they are not assembled in such a way as to make it a first-class instrument. It has no carrying quality - no tone-carrying quality. In my estimation it is not constructed to have a good tone-carrying quality. ** This piano is unlike a piano of its value and class and cost and appearance and everything in general. *** It is not constructed for a high-grade piano in any way. You cannot get very much result as far as music possibility is concerned." That while the hammers could be "voiced," which means priming the hammers, it would not "stand up." That it is a "commercially made piano, one made to sell quickly."

This testimony is not substantially denied. The two men sent by plaintiff testified that the piano needed voicing; that the "pump" makes a slight noise.

Sec. 16, chap. 121a, Ill. Stat., provides that where it appears that the buyer relies on the seller's skill and judgment there is an implied warranty that the goods sold shall be reasonably fit for the purpose for which the goods are sold.

In J. P. Seeburg Piano Co. v. Lindner, 221 Ill. App.94, it was held that there was an implied warranty that a pipe organ could be satisfactorily played and used in the service for which it was bought, and that if the evidence showed a breach of such warranty the buyer could not be held for the purchase price. We hold that in the instant case there was an implied warranty that the piano would be reasonably satisfactory to the purchaser for the purpose for which it was bought, and that the evidence amply proved that it failed in this respect and there was a breach of the implied warranty.

Fenton testified that the "sale was negotiated on the basis that it was to be on thirty days trial." It is not denied that defendant notified him within thirty days that the piano was unsatisfactory and requested its removal and that he agreed to have it removed. There is no convincing evidence to contradict this. Mr. Percival, plaintiff's general manager, was present only part of the time while defendant was examining pianos in the Wabash avenue store and did not hear all that was said between Fenton and the defendant.

Fenton's authority to make such conditional sale is attacked. He was the general sales agent in charge of the branch store of the plaintiff and was recognized as a general agent. If there was any limitation on his authority to negotiate and make terms with a purchaser, such limitation was known only to his principals and himself. So far as the public was concerned, he had apparent authority to negotiate the terms of sales. Even if he exceeded his private instructions, yet if he acted within the apparent scope of his authority, the plaintiff will be bound. Swisher v. Palmer, 106 Ill. App. 432; Parker v. Grilly, 113 Ill. App. 309; U. S. Life Ins. Co. v. Advance Co., 80 Ill. 549.

The evidence established a rescission of the contract. Fenton repeatedly told defendant that plaintiff would take the piano out of her apartment. He so requested Percival, the general manager, who promised to "pick it up." Later when Percival and Fenton were discussing a commission which Fenton claimed on the sale of this piano, Percival refused to allow the same, saying "that piano is coming back and you do not get any credit for it," and that it would positively be picked up. It was sufficiently established that the plaintiff agreed to take the piano back.

The defenses asserted by defendant were sufficiently established by the evidence and the trial court was not justified in finding against her. The judgment will therefore be reversed

Fenton insisted that the "safe was jeopardized on this basis that it was to be an unlucky day being." It is not determined that defendant merelled him within twenty days that the stamp was unnecessary and requested its removal and that he agreed to have it removed. There is no convincing evidence to contradict this. Mr. Hurvitzel, plaintiff's general manager, was present only part of the time while defendant was examining stamps in the Wurzel stamps room and did not hear all that was said between Fenton and the defendant.

Fenton's ability to make such arrangements was in question. He was the general sales agent in charge of the branch store of the plaintiff and was recognized as a general agent. If there was any limitation on his authority to negotiate and make terms with a purchaser, such limitation was known only to him principals and himself. So far as the public was concerned, he had apparent authority to conclude the sale of safes. Even if he exceeded his private instructions, yet if he acted within the apparent scope of his authority, the plaintiff will be bound. Bulmer v. Fisher, 147 Ill. App. 41; Dalton v. Smith, 112 Ill. App. 309; Y. M. C. A. v. Schmidt, 46 Ill. App.

The evidence established a recognition of the contract. Fenton repeatedly held defendant that plaintiff would take the plans out of her premises. In a telephone interview, the general manager, who produced to "plan it on." Later when Fenton and Hurvitzel were discussing a conversation with Fenton claimed on the main of this plans, Hurvitzel refused to allow the same, saying "that plans is worthless and you do not get any credit for it." and that it really constitutes plans on. It was sufficiently established that the plaintiff agreed to have the plans done.

The letters exchanged by defendant were sufficiently established by the evidence and the trial court was not justified in finding against her. The judgment will therefore be reversed

with a finding of facts and judgment of nil capiat will be entered in this court.

REVERSED WITH FINDING OF FACTS
AND JUDGMENT OF NIL CAPIAT.

Matchett and Johnston, JJ., concur.

235 - 31367 FINDING OF FACTS.

We find as ultimate facts that there was an implied warranty that the piano in question would be in playing qualities reasonably satisfactory to the defendant, and that there was a breach of such implied warranty. We also find that the sale was conditioned upon a thirty days trial of the piano by the defendant, and that within said time the piano proved to be unsatisfactory, and that plaintiff was so notified and agreed to remove the piano from defendant's apartment. We also find that plaintiff agreed to rescind the contract and take back the piano.

295 - 31427

CAROLINE LEDERER, Executrix of and Trustee Under the Will of Samuel Lederer, Deceased, Appellant, vs. SAMUEL GOLDMAN, alias SAMUEL Q. GOLDMAN, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from an adverse judgment in a suit to recover rent. Under a written lease with power of attorney, judgment by confession was first entered against defendant, but on his motion this was set aside and upon hearing by the court the judgment was against the plaintiff. The defendant does not appear in this court to defend this judgment.

The lease provided for rental at $125 a month and expired April 30, 1925. Defendant remained in possession of the premises and paid plaintiff rental at the same rate for May, June, July, August and September, 1925. He moved September 29th, and this suit is for rental for the months of October, November and December, plaintiff claiming defendant is a hold-over.

Defendant claimed that he had an agreement to pay rent only for the time he occupied the premises. The trial court found against him on this issue and held that he was a hold-over tenant, but during argument raised the question whether plaintiff had proved damages for the months in question. A witness who rented the property for the plaintiff was still in court, and plaintiff offered to recall him to prove that plaintiff did not rent the premises after the defendant moved out; but the court ruled that it had no discretion to allow the witness to be recalled

after the plaintiff had put in her case. In the absence of any evidence as to the rental value of the property and the failure to prove that no one else had paid rent for the months in question, the court entered a finding for the defendant.

The court was in error in not allowing the plaintiff to supply further proof. The court has discretion to allow parties to introduce evidence even in a jury trial after the arguments are completed and the jury has been instructed. Indiana, D. & W. Ry. Co. v. Hendrian, 190 Ill. 501; Chicago City Ry. Co. v. Carroll, 206 Ill. 318; Stivers v. Conklin, 103 Ill. App. 288; Nyberg Automobile Works v. Devaux, 159 Ill. App. 95.

The proof established a hold-over. Defendant failed to prove the alleged agreement to be relieved of rent when he moved from the premises. The trial court so found, as follows:

> "The court finds from the evidence that the defendant, Samuel Goldman, held the demised premises after the expiration, by its terms, of the lease in evidence without any valid and binding agreement with the landlord Samuel Lederer inconsistent with the exercise by said Samuel Lederer of his right to treat the tenant Goldman as a hold-over tenant for the year commencing May 1, 1925, under the same rent and provisions as the lease in evidence which by its terms expired April 30, 1925; and that Samuel Lederer elected to and did hold said Goldman as such holdover tenant; and that said Goldman paid to said Lederer, or his agents, or the agents of the executrix and trustee under his will, rent of $125 per month for the months of May, June, July, August and September, 1925, which rent the said Lederer, his agents, etc., accepted."

No objection or exception was taken to this. The hold-over was on the same terms as the written lease. Clinton Wire Cloth Co. v. Gardner, 99 Ill., 151; Goldsborough v. Gable, 140 Ill. 269; Epstein v. Kuhn, 225 Ill. 115.

The covenant to pay rent is an independent covenant, and plaintiff was entitled to recover according to its terms unless the defendant shows its termination by eviction, release or surrender or a reduction by set-off or recoupment. Selz v. Stafford, 284 Ill. 610; Jones on Landlord and Tenant, p. 770. The abandon-

after the plaintiff had put in her case. In the absence of any evidence on behalf of the defendant and the failure to prove that he was also had good cause for the conduct in question, the court entered a finding for the defendant.

The court was in error in not allowing the plaintiff to amply further proof. The court has discretion to allow parties to introduce evidence even in a jury trial after the arguments are completed and the jury has been instructed. Jackson, 3. S.W. (2d) 1, 4, Fowler, 190 Ill. 304; Gilmore (111. 2d) 2. 2.

Barrett, 308 Ill. 424; Illinois v. Conklin, 309 Ill. App. 600; Kidner Automobile Sales v. Jones, 308 Ill. App. 69.

The court substituted a hold-over. Defendant failed to prove the diligent endeavor to be relieved of such an error from the premises. The trial court so finding as follows:

"The court finds from the evidence that the defendant, Samuel Goldman, held the disputed premises after the expiration of his terms, of the lease in evidence without any valid and binding agreement with the landlord Samuel Lederer tenancy-at-will with the exception by said Samuel Lederer of the right to the tenant holdover as a hold-over tenant for the year January 1, 1956, under the same rent and provisions as the lease in evidence which by its terms expired April 30, 1956; and that Samuel Lederer elsewhere is and did hold said Goldman as such holdover tenant; and that said Goldman held in said Lederer, or his agents, by the agents of the executrix and trustee under his will, over of $125 per month for the premises of May, June, July, August and September, 1956, which was the said Lederer, his agents, etc., accepted."

No objection or exception was taken to this. The hold-over was on the same terms as the written lease. Illinois Fire Clay Co. v. Stirner, 99 Ill., 148; Bartlettmann v. Ziegler, 140 Ill. 489; Kuntzsche v. Kuhn, 171 Ill. 318.

The question in dispute is an independent statement, and plaintiff was entitled to receive something to the same value the defendant owes its termination by minister, actions or mutual or a reduction by set-off in recovery. Dale v. Hilliard, 244 Ill. 618; Fuller on Landlord and Tenant, 2. ed. The statutes

ment did not terminate defendant's liability to pay the agreed rental. Union Pac. Ry. Co. v. Chicago, R. I. & Pac. Ry. Co., 164 Ill. 88. The proof of the lease was prima facie proof authorizing the recovery of rent therein reserved. Jones on Landlord and Tenant, p. 770; Cohen v. Plumtree, 170 Ill. App. 311; Weidknecht v. Clark, 215 Ill. App. 308. There was sufficient evidence before the court to justify a judgment for the plaintiff.

We are asked to give judgment for the plaintiff in this court, and we have the power so to do. Sec. 110, chap. 110, Practice Act, Ill. Stat.; Sherriff v. Kromer, 232 Ill. App. 589; Trustees v. Hoyt, 318 Ill. 60.

The judgment is reversed with a finding of facts and judgment for the plaintiff is entered here for $375.

REVERSED WITH FINDING OF FACTS
AND JUDGMENT HERE.

Matchett and Johnston, JJ., concur.

295 - 31427 FINDING OF FACTS.

The court finds as ultimate facts from the evidence that the defendant held over from the lease expiring April 30, 1925, and that defendant became and was bound to pay rent at $125 a month for the year commencing May 1, 1925, under the same terms as contained in the written lease, and that the plaintiff is entitled to rent at the rate of $125 a month for the months of October, November and December, 1925.

317 - 31449

AUTHORS PRESS, a Corporation, Appellee, vs. GEORGE F. KILLINGER, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment against him for $172, representing the balance claimed to be due on a twenty volume set of Authors Digest sold by plaintiff to him.

The case was first tried by a jury which returned a verdict in favor of the defendant. On motion this was set aside and a new trial granted. Thereupon the parties agreed that a jury be waived and the cause submitted to the court. The evidence heard by the jury was considered by the court, which found for the plaintiff.

Defendant's attorney in his brief argues the case on the theory that the proceedings on the trial by the jury are before us for review. This is a misconception of the situation. When the verdict of the jury was set aside and the motion for a new trial granted, those proceedings were wiped out as far as this court is concerned. It is for us only to consider whether the evidence justified the finding of the court.

Defendant was approached by H. Michaelson and a conversation was had looking to the purchase by defendant of a twenty volume set of the Authors Digest. A written contract of sale was signed which contained the specifications of the volumes. The only one in issue is specification #4, which described the binding as "full leather."

Defendant claims that when he purchased the books Michaelson showed him a limp leather binding and defendant bought the set with the understanding that it would come in limp leather binding; that Michaelson said that this type of binding was a "full leather" binding as specified by the contract; that when the books were delivered he discovered that the binding was "not in accordance with the binding on said book as described and exhibited to him by" Michaelson. Defendant wrote plaintiff two letters refusing to accept the books for the reason that they were not as represented by the agent, although in neither of these letters is it specifically stated in what respect they differed from the contract specifications. There is no definite evidence as to how the books received by defendant were bound, but it seems to be assumed by both parties that the binding was leather over a pasteboard back.

Mr. Weiland testifying for the plaintiff said that he had been in the book binding business for twenty-five years and was familiar with all kinds of bindings; that stiff leather binding is leather over a pasteboard back, and this style of binding is known in the trade as "full leather" binding; that limp leather binding is also known as full leather binding.

Michaelson testified that he had no limp leather binding with him when he called on defendant, but did have a pasteboard back covered with leather binding, which was known in the trade as full leather binding. The secretary of the plaintiff testified that the company did not possess nor furnish to Michaelson any samples of limp leather binding.

Upon this record the trial court properly held that the leather binding over a pasteboard back met the requirements of the contract calling for full leather binding. The judgment is therefore affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

Defendant claims that when he purchased the books Blackstone showed him a like leather binding and defendant bought the set with the understanding that it would come in like leather binding. That Blackstone said that this type of binding was a "full leather" binding as specified by the contract; that when the books were delivered he discovered that the binding was not in accordance with the binding on said book as described and exhibited to him by Blackstone. Defendant wrote plaintiff two letters refusing to accept the books for the reason that they were not as represented by the agent, although in neither of these letters is it specifically stated in what respect they differed from the contract specifications. There is no definite evidence as to how the books received by defendant were bound, but it seems to be assumed by both parties that the binding was leather over a pasteboard back.

Mr. Wylland testifying for the plaintiff said that he had been in the book binding business for twenty-five years and was familiar with all kinds of bindings; that half leather binding is leather over a pasteboard back, and this style of binding is known in the trade as "full leather" binding; that like leather binding is also known as full leather binding.

Blackstone testified that he had no like leather binding with his sale when he called on defendant, but did have a pasteboard back covered with leather binding, which was known in the trade as full leather binding. The secretary of the plaintiff testified that the company did not carry any records to ascertain any sales of like leather binding.

Does this record the bill merely requires that the leather binding over a pasteboard back met the requirements of the contract calling for full leather binding. The judgment is therefore affirmed.

Affirmed.

Taylor and Crawford, JJ., concur.

328 - 31460

W. C. HANDLEY, Appellant, vs. JAMES J. JOYCE and OTTILIA LOBINSKI, Appellees.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

244 I.A. 624

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant Joyce gave his note secured by a chattel mortgage and guaranteed by defendant Ottilia Lobinski as payment for an automobile purchased from the Peak Motor Sales Company. Plaintiff Handley claiming to be a holder in due course brought suit and upon trial by a jury a verdict was returned for defendants and judgment of nil capiat followed, from which plaintiff appeals.

The defendant claimed that he bought the car upon the condition that if it did not prove satisfactory it could be returned, and that it did not prove satisfactory and was returned. Upon this issue, the jury could properly believe that before Joyce purchased the automobile he requested permission to use it a couple of days so as to determine its condition; that he was advised that it was not necessary to do so, as the Peak Company stood back of every sale it made; that Joyce requested a guaranty of the car but was advised that no guaranty was necessary because the Peak Company would back up its sales, and if the car was not in good condition Joyce could return it; that Joyce called the attention of the salesman to the clutch and was informed that that was the nature of the clutch in the type of car he was buying, a Dort, and that such clutch was peculiar to the Dort car and that as soon as Joyce got the knack of running a Dort he would have no

trouble with it. Upon these representations the note was executed by Joyce, guaranteed by Mrs. Lobinski, and delivered to the Peak Company and the car delivered to Joyce.

When the car had gone about a block and a half it stopped and it was necessary to tow it to Joyce's home. He called up the Peak Company, explained the situation, and was told that a mechanic would call and make the necessary repairs. The mechanic did not come for several days, but finally arrived and tried to start the car, but failed. The car was towed to the Peak Company, where it has remained ever since. After the defendant received the car it was found that the clutch was broken and there was a knock in the motor. The brakes were worn, the gear shift locked, and there could be no shifting of gears without stopping the car. All this was reported to the Peak Motor Company.

From this and other evidence the jury could properly conclude that the sale was made on condition that the car could be returned if it was not satisfactory, and that Joyce had reasonable grounds for being dissatisfied with it and returned it. The condition upon which the car was sold having failed, the consideration for the note also failed, and the jury properly found that Joyce was not liable.

There was also evidence from which the jury could properly conclude that Handley, the plaintiff, did not receive the note until after defendant had notified him that the car had been returned to the Peak Company, and that there was no consideration for the note; but in any event, as the note was secured by a chattel mortgage, which fact appeared on its face, a purchaser for value before maturity is not a holder in due course, and such a note is subject to any defenses existing between the payee and the payer. Cook v. Augustus, 201 Ill. App. 195; Epstein v. Ft. Dearborn Cartage Co., 207 Ill. App. 321.

Plaintiff asserts that, even if the original maker cannot be held on the note, the guarantor may be held, but the cases cited in support of this proposition are not in point. The rule is to the contrary. Failure of consideration of the principal contract is a good defense on behalf of the guarantor. 20 Cyc, p. 1418; Paton v. Stewart, 78 Ill. 481; Harts v. Fowler, 51 Ill. App. 612, affirmed in 149 Ill. 592.

We cannot say that the verdict of the jury is manifestly against the weight of the evidence. It follows therefore that the judgment should be affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

346 - 31478

EDWARD J. O'HARA, Appellee, vs. COUNTY OF COOK OF THE STATE OF ILLINOIS, Appellant.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

244 I.A. 324

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his declaration in assumpsit, to which defendant filed pleas. The case came on for trial in December, 1924, but defendant was not present and the court instructed the jury to find a verdict in favor of plaintiff for $3350, and judgment was entered on the verdict. Before the term expired a motion was entered on behalf of defendant to vacate the judgment and set aside the verdict. This motion was supported by affidavits. It is said the trial court kept this motion under advisement for a year and a half and then denied it. Defendant appeals.

The motion to vacate was supported by affidavits which showed that defendant was not present when the case was called for trial for the reason that it was misled by an announcement in the Law Bulletin. Without reciting the circumstances in detail, we are of the opinion that the affidavits showed a meritorious defense and also an excusable mistake on the part of the defendant, which explained its absence when the case was called for trial. In the exercise of sound discretion, the trial court should have allowed the motion to vacate the verdict and set aside the judgment.

Defendant, however, stresses the point that the declaration is fatally defective and that this may be asserted at any time.

Plaintiff was employed by the County of Cook, under civil service, as a relief investigator, investigating poor people applying for help. It is stated that the number of these investigators varies with the seasons; in the summer only ten or twelve are retained and in the winter the number runs as high as forty. When the warm weather arrives, those not needed are laid off by the civil service commission, and when the cold weather comes they are put back on duty. Plaintiff had been one of these investigators for about ten years, during which time he was laid off in the summer. In 1922 he commenced this suit for $7,000, which he claims should have been paid to him during the periods he was laid off. The declaration does not allege that O'Hara performed any services for the County during the time he was laid off.

A division of this court had occasion to consider a similar case in Golden v. County of Cook, 241 Ill. App. 597, in which very thorough consideration of the points presented was given. It was there held that, where the civil service employee was laid off and all moneys appropriated for the position had been paid to other appointees during the entire period, the employee is not entitled to recover any portion of his claim, the general rule being that, if the payment of salary or other compensation by the government is made in good faith to an officer de facto while he is still in possession of the office, the government cannot be compelled to pay a second time to the officer de jure. This is supported by a large number of decided cases.

The instant declaration alleges that the defendant paid to others the salary appropriated for the position, hence for the reasons stated in Golden v. County of Cook, supra, which we follow, plaintiff cannot recover.

Another fatal objection to plaintiff's declaration

[illegible] Whatever was employed by the Deputy of Cook, under civil service, on a relief investigator, investigating poor people applying for help. It is plain that the number of these investigators varies with the economy; in the summer only two or three are retained but in the winter the number even as high as fifty. When the warm weather arrives, those not needed are laid off by the civil service commission, and when the cold weather comes they are put back on duty. Whatever had been one of these investigators for about ten years, during which time he was laid off in the summer. In 1930 he commenced suit for $[illegible] on claims already have been paid to him during the periods he was laid off. The municipalities have not always been careful, perhaps not anxious, for the County Judge, the fact he was laid off.

A decision of this court had concerning an employee of similar case in Julian v. County of Cook, 271 Ill. App. 201, in which very careful consideration of the point presented was given. In our first opinion in that case, where the civil service employee was laid off and all county appropriations for his position had been paid in other municipalities during the review period, the employee is not entitled to receive any pension at the claim. The general rule being that, if the pension is already or other compensation by the government is made in good faith so as effect in fact the employee is still in possession of the office. The government cannot be compelled to pay a second time to the officer de jure. This is accomplished by a large number of judged cases.

The Retired Pensioners argue that the Retirement Board is given the sole power/jurisdiction for the decision, hence for the reason stated in Julian v. County of Cook, supra, which we follow, plaintiff cannot recover.

Another point relating to administrative remuneration

is that it does not appear that after he had been laid off he offered to render any services or made any attempt by mandamus or other direct action to determine the question whether or not he had been legally laid off. Burris v. Board of Education, 231 Ill. App. 397; Kenyon v. City, 135 Ill. App. 227; City v. Lutkardt, 191 Ill. 515; Golden v. County of Cook, supra.

Plaintiff's attorney does not gainsay this, but argues that, as the declaration included the common counts, one good count is sufficient to sustain the verdict. The affidavit of claim attached to plaintiff's declaration is for salary appropriated and due from the defendant. This affidavit eliminates the common counts, because a verified statement of plaintiff's claim must state all the facts necessary to support plaintiff's action and plaintiff is limited in his proof and recovery to the facts set up in his affidavit of claim. Redding v. Looney, 208 Ill. App. 413; Goddard Tool Co. v. Crown Electrical Mfg. Co., 219 Ill. App. 34; Keime v. Thum, 238 Ill. App. 519.

Plaintiff argues that pleading to the merits is a waiver to demurrable defects, citing Pittsburg, C. C. & St. L. Ry. Co. v. Robson, 204 Ill. 254. This case, however, decides that pleading to the merits is a waiver unless the declaration is so defective that it will not sustain the judgment. It has been repeatedly held that the fact that a declaration does not state a cause of action is not waived by filing a plea of the general issue, and the point may be raised for the first time on appeal. C. R. I. & P. Ry. Co. v. People, 217 Ill. 164; Gillam v. Chicago Rys. Co., 268 Ill. 305.

Plaintiff's declaration will not support the verdict, which is reversed and judgment of nil capiat entered in this court.

REVERSED AND JUDGMENT OF NIL CAPIAT.

Matchett and Johnston, JJ., concur.

369 - 31501

CENTRAL AND PACIFIC IMPROVEMENT CORPORATION, Appellee, vs. MARCUS M. HUEBSCH, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment against him entered upon a directed verdict for $1838.12, upon trial of a suit for the collection of a note.

April 19, 1924, defendant gave plaintiff $1000 cash and the note in question for $1500, to secure an alleged option to purchase real estate from the plaintiff. The evidence tends to show that defendant, while in Los Angeles, California, was introduced to Samuel Grauman who was in the real estate business in that city, and also director of plaintiff corporation. Grauman showed defendant property on Main and 15th streets in Los Angeles, and pursuant to negotiations defendant gave his note, together with his check for $1000, to Grauman and an option contract was entered into as follows:

"CENTRAL & PACIFIC IMPROVEMENT
CORPORATION
CAPITAL $2,000,000
123 WEST WASHINGTON STREET
PHONE 285-735

Directors	Directors
R. H. Raphael, President	H. Koch
G. Spencer Shimmin, 1st Vice pres.	L. Coldwater
Jules Kauffman, 2nd Vice-pres.	G. A. Miller
N. J. Louis, 3rd Vice Pres.	Joshua H. Parks
	C. Roy McKeon, Secretary
	Arthur Wright, Attorney

UNITED, AND VALLEY INDUSTRIALIST
CORPORATION,
Appellee,

vs.

ELECTA E. PERRIN,
Appellant.

C. Specht
Jacob Stern
Morris Cohn

LOS ANGELES, CAL.

April 19, 1924

RECEIVED from M. A. Muebsch ONE THOUSAND DOLLARS ($1,000.00) in cash and a note for FIFTEEN HUNDRED DOLLARS ($1500.00) due in four (4) months' time, as an option to purchase the Northwest corner of Fifteenth and Main Street sixty (60) feet front by one hundred twenty-five (125) foot in depth, more or less. This option to be for a period of one hundred and twenty (120) days. The purchase price of this property to be EIGHTY-FIVE THOUSAND DOLLARS ($85,000.00).

This agreement subject to the confirmation of Mr. R. H. Raphael, President of the Central & Pacific Improvement Corporation.

Central and Pacific Improvement Corp.
R. H. Raphael, Pres.
C. Roy McKeon, Secy.
Sam Grauman
M. A. Muebsch."

Defendant did not exercise his option to purchase within the one hundred twenty day limit, and this suit followed to collect the amount of the note.

Defendant asserts that the property is indefinite and uncertain in that the option agreement does not show in what city and state it is located. The parties were negotiating for property in Los Angeles, California, and the option was signed there in plaintiff's office. The instrument on its face refers to property in Los Angeles, California, and anyone reading it would so understand. We hold that the description of the property is sufficiently definite.

Among the cases tending to support our conclusion are: Ullsperger v. Meyer, 217 Ill. 262; Weber v. Adler, 311 Ill. 547; Hayes v. O'Brien, 149 Ill. 403; Evans V. Gerry, 174 Ill. 508.

It is said that the memorandum does not satisfy the Statute of Frauds, being indefinite and uncertain as to the property. Plaintiff properly says that this contract made in California must be governed by the Statute of Frauds, if any, of that state and that no such statute is either pleaded or proven. Even tested by

E. Spence
Jacob Jones
Myrtle Lane

[illegible] 111.

April 18, 1979

MEMORANDUM from E. E. Hughes and THEODORE WHITLAND
[illegible] to work out a scale for FINANCIAL BROKERS
HOLDING [illegible] dps in four (4) months' time, on an
option to purchase the Australasian Center of Affairs and
Main street study (at first fixed by one Bertrand Bensly-
ites [illegible] to tell, move in line. This option to
be for a period of one hundred and twenty (120) days.
The purchase price of this property is to be [illegible]
thousand [illegible].

This memorandum supersede the [illegible] of Mr.
E. E. Hughes, President of the Central & Pacific Im-
provement Corporation.

Central and Pacific Improvement Corp.
E. E. Hughes, Pres.
E. Ray Palmer, Secy.
Jos. Thomas
E. E. Hughes."

Interest will not advertise his action to increase
either the one hundred twenty day limit, and this will followed
to action at the record, or the bid.

Defendant argues that the property in Lafollette was
worthless in that the entire transaction was done in that city
and that it is hearsay. The policies were negotiating for property
in Los Angeles, California, and the action was filed there in
identical effect. The testimony on the case relative to property
in Los Angeles, California, was larger having it would be inter-
ested. To said that the testimony of the property in Lafollette
defective.

Among the cases bearing on material and conclusion are:
Tillmanson v. Moore, 147 Ill. 89; Taylor v. Allen, 111 Ill. 147;
Turner v. Tyler, 147 Ill. 417; Jones v. Perry, 171 Ill. 395.

It is well that the counsel have not relied on
claims of fraud, using hearsay and evasion as to the property,
plaintiff argues that that matter material made in Lafollette must
be proved by the Statute of Frauds, if any, or that such and
that no such stands in effect cited or proved. Then issued by

the Illinois Statute of Frauds, the contract is sufficient. McConnell v. Brillhart, 17 Ill. 354; Ullmperger v. Meyer, 217 Ill. 262; Cossitt v. Hobbs, 56 Ill. 231; Spangler v. Dunforth, 65 Ill. 152; Evans v. Gerry, 174 Ill. 805.

The agreement was binding on the plaintiff. It was signed by its president and secretary. Plaintiff was the owner of the property and was in a position to convey the same at any time upon the payment of the purchase price. It is not necessary to the validity of an option contract that that there be an express agreement by the owner to sell. An option contract gives one the privilege of becoming a purchaser. Any sufficient consideration will make such a contract binding.

> "A unilateral contract of this kind, in which one party confers an option upon the other, is in reality a conditional agreement; and upon the happening of the condition, that is to say, when the option given is declared or the election provided for is made, the agreement becomes absolute and the obligations of the parties become mutual. (Pomeroy on Contracts, sec. 169.)" Guyer v. Warren, 175 Ill. 328.

The contract was executed by the president and secretary of the plaintiff corporation, and in McCartney v. Clover Valley Land & Stock Co., 232 Fed. 697, it was held that the section of the California Code requiring an agent's authority to execute a contract to be in writing, does not apply to the executive officers of a corporation.

By Sec. 2310 of the California Code it is held that ratification can be made by a corporation by accepting or retaining the benefit of the act. Plaintiff received and kept the $1000 and the note in question. In Domestic Building Assoc. v. Quadiano, 195 Ill. 222, it was held that by accepting the cash deposits the building association ratified the action of its officers.

Some point is attempted because the name of Sam Grauman is signed to the option contract, but we do not see that

The California Statute of Frauds, the contract is void/voidable. Ingersoll v. Dwellhart, 57 Cal. 594; Tillmanson v. Hanson, 87 Cal. 227; Yerkit v. Wells, 84 Cal. 272; Dunsmuir v. Dunsmuir, 15 Cal. 477; Brown v. Sayre, 147 Cal. 227.

The argument was directed to the validity. It was signed by the president and secretary. Validity was the power of the property and was in a position to convey the same at any time upon the payment of the purchase price. It is the contemporary in the validity of an option contract that there be an express agreement by the owner to sell. An option contract gives one the privilege of buying a property. Any bilateral contracts will make such a contract binding.

"A unilateral contract of this kind, in which one party confers an option upon the other, is in reality a conditional agreement; and upon the happening of the condition, that is to say, when the option gives its exercise at the direction provided for is made, the original bargain absorbs and the obligations of the parties become mutual. (Tiedeman on Contracts, sec. 149.)" Dwyer v. Tyrone, 177 Cal. 324.

The contract was executed by the president and secretary of the validity accordingly, and in Ballantyne v. Glenn Valley Land & Water Co., 157 Cal. 467, it was held that the action of the California Code requiring an agent's authority to execute a conveyance to be in writing, does not apply to the executive officers of a corporation.

By Sec. 2310 of the California Code it is held that conditions can be made by a corporation by executing or validating the benefit of the act. Validity received and kept the plaintiff and the note is invalid. In Investing Building Assoc. v. Hopkins, 148 Cal. 227, it was held that by executing the note towards the building association validated the action of the officers.

Some point is alleged because the name of Ian Grannan is signed to the option contract, but we do not see that

this would have an important bearing one way or another. It certainly would not invalidate the agreement.

The note provided for the payment of $1500 with interest and ten per cent of the principal as attorneys' fees. The amount of the judgment does not seem to be seriously questioned.

The objections to the validity of the option contract are not substantial, and upon the evidence the trial court was justified in instructing the jury to find for the plaintiff.

The judgment is affirmed.

AFFIRMED.

Hatchett and Johnston, JJ., concur.

this would have an improved hearing and not be barred. It probably would not invalidate the statute.

The main decision for the judges of this week was between and the jury that of his criticized an attorney' law. The amount of the judgment that seem to be obviously unreasonable.

The objections to the validity of the medical testimony are not substantial, and upon the evidence the trial court was justified in submitting the jury to find for the plaintiff.

The judgment is affirmed.

LAWYERS.

Weights and Measures, 71., amount.

387 - 31519

NICK PETROPOULOS, Appellee,	)	
vs.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
THEODORE KARATZIAFERIS, Appellant.	)	

244 I.A. 624

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, the lessor, brought suit against the lessee for rent under a written lease. A jury gave him a verdict for $1220, and from the judgment of this amount defendant appeals.

The lease was for a term beginning May 1, 1920, and ending April 30, 1925, at $100 a month. Defendant occupied the premises but vacated the leased storeroom thereof in April, 1924. This suit is for rental for the balance of the term.

Defendant claims that by a separate document plaintiff agreed to repair the water pipes, gas pipes, doors and windows wherever such repairs are needed, and the testimony was concerned with the fact of these repairs, the defendant asserting that the plaintiff had not made them and the plaintiff introducing testimony tending to show that he had complied with his undertaking in this respect. There was some conflict in the evidence, but we are not prepared to say that the conclusion of the jury that plaintiff had made the repairs which he had agreed to make is manifestly against the greater weight of the evidence.

Defendant also claimed that there was a surrender of the premises and an acceptance thereof by the landlord. This also was a question of fact for the jury to determine, and we cannot hold that the verdict in this respect was not justified.

It is assigned as error that the court improperly

restricted defendant's cross-examination with reference to the thirteenth provision of the lease. This was a provision that, in the event the building was condemned by the City, the landlord would not be subjected to any damages to the tenant. As there is no evidence that the premises were condemned, we do not think the question relating to this provision was important.

The verdict was based upon the rental of $100 a month for twelve months. Defendant was entitled to certain credits. The lease shows that the defendant made a deposit with his landlord of $500 for the purpose of being applied "by the party of the first part (the landlord) upon any damage sustained" by him by reason of any default of the tenant. There is no evidence of any damages except the rental. The jury should have given defendant credit for this amount.

There is also in evidence that plaintiff after defendant vacated the premises leased a portion of same for $20 a month, and defendant's attorney asserts that he is entitled to a credit of $240. Plaintiff's counsel does not controvert this.

The verdict is therefore too large by $740. If plaintiff will file a remittitur of $740 in this court within ten days from the date of the filing of this opinion, the judgment will be affirmed for $480; otherwise the judgment will be reversed and the cause remanded.

AFFIRMED UPON REMITTITUR OF $740;
OTHERWISE REVERSED AND REMANDED.

Matchett and Johnston, JJ., concur.

Plaintiff's counsel's cross-examination with reference to the interests provision of the lease. This was a provision that, in the event the building was condemned by the City, the tenant would not be subjected to any damages to the tenant. As there is no evidence that the premises were condemned, we do not think the question relating to this provision was important.

The verdict was based upon the rental of $800 a month for twelve months. Defendant was entitled to contrary credits. The lower court then instructed such a verdict with the interest of $800 for the purpose of being applied "by the amount of the first part [the landlord] upon any damage sustained" by him by reason of any default of the tenant. There is no evidence of any damage caused the prior. The jury could have given defendant credit for this amount.

There is also no evidence that liability after defendant vacated the premises issued a petition or sued for $1,[illegible] and defendant's attorney always that he is entitled to a credit of $[illegible]. Plaintiff's counsel does not controvert this.

The verdict is therefore too large by $[illegible]. If plaintiff will file a remittitur of $[illegible] in the court within ten days from the date of the filing of this opinion, the judgment will be affirmed for $[illegible]; otherwise the judgment will be reversed and the cause remanded.

[illegible]

Affirmed upon remittitur of $[illegible].

Robert and Johnson, JJ., concur.

19 - 30657

GEORGE GLEZOS,
Defendant in Error,

v.

VASILIOS GLEZOS,
Plaintiff in Error.

ERROR TO SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a writ of error prosecuted by Vasilios Glezos, the defendant, from a judgment in the Superior court of Cook county, in favor of George Glezos, the plaintiff. An appeal in this case also was prosecuted to this court by the defendant. In the appeal, No. 27934 not reported in full (230 Ill. App. 647), we reversed the judgment and remanded the cause. After a careful review of the evidence we held in an opinion written by Mr. Justice McMurely, that the evidence showed convincingly that the claim of the plaintiff had been compromised and settled by a written stipulation, which was filed in a former action between the parties in the Municipal court of the City of Chicago. The written stipulation was introduced in evidence in the case at bar and showed that the plaintiff had signed it by his mark. The stipulation is as follows:

"State of Illinois)
County of Cook) ss

In the Municipal Court of Chicago.

George Glezos)
vs.) No. 212, 725.
Vasilios Glezos)

STIPULATION.

A. It is hereby stipulated and agreed by and between the parties hereto that the above entitled

cause be and the same is hereby dismissed without costs, all matters in controversy between the parties to said cause having this day been fully compromised and adjusted by the execution and delivery by said defendant to said plaintiff of his, said defendant's promissory note for one thousand dollars, payable five years after date, with interest at six per cent per annum, payable semi-annually both principal and interest secured by deed of trust on real estate in Cook County, Illinois.

Dated Chicago, May 7, 1918.

His
George X Glezos
Mark

Plaintiff

Vasilius Glezos,

Defendant.

Stedman and Soelke, Attorneys for Plaintiff,
McInerney & Powers, Attorneys for Defendant."

On the present trial the plaintiff testified that he did not make his mark; that he knows how to write; that he did not know the contents of the stipulation and that the stipulation was never read or explained to him.

The evidence on this writ of error is substantially the same as on the former appeal, with the exception that an additional witness in the present case testified on behalf of the defendant in regard to the compromise and settlement of the action in the Municipal court. The additional witness, John F. Power, was the attorney for the defendant in the action in the Municipal Court. Power testified that he saw the plaintiff make his mark on the stipulation; and that he also saw the defendant sign the stipulation.

We see no reason to change our opinion expressed on the appeal. On the contrary the additional testimony of Power strengthens our conclusion that the claim of the plaintiff was compromised and settled in the former action in the Municipal Court.

For the reasons stated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

On the present trial the plaintiff testified that he did not make his market that he knew by or which he did not know the contents of the stipulation and that the stipulation was never read or explained to him.

The evidence on this writ of error is substantially the same as on the former appeal, with the exception that an additional witness in the present case testified on behalf of the defendant in regard to the conversation and settlement of the action in the Municipal court. The additional witness, John H. Power, was the attorney for the defendant in the action in the Municipal Court. Power testified that the now the plaintiff made his mark on the stipulation and that he also saw the defendant sign the stipulation.

We see no reason to change our opinion expressed on the appeal. On the contrary the additional testimony of Power strengthens our conclusion that the claim of the plaintiff was compromised and settled in the Municipal action in the municipal court.

For the reasons stated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

26 - 30812

MARIE STRAKA, Defendant in Error, vs. CHICAGO TITLE & TRUST COMPANY, Administrator de bonis non of the Estate of Robert Batysta, Deceased. EMILY SPICKA, Plaintiff in Error.	ERROR TO SUPERIOR COURT OF COOK COUNTY.

244 I.A. 625

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a writ of error prosecuted by Emily Spicka, one of the defendants, to review a decree confirming the Master's report in favor of Marie Straka, the complainant, in a suit brought by the complainant against the Chicago Title and Trust Company, administrator of the estate of Robert Batysta, Emily Spicka, and others, to compel the specific performance of an alleged contract between the complainant and Batysta in which, according to the averments of the complainant, Batysta agreed to give to the complainant all of his property, either at the time of his death or before his death. The defendant, Emily Spicka, was a sister of Batysta.

The principal contentions of the defendant, Emily Spicka, are (1) that "the claim of the complainant is barred against inventoried assets by virtue of her failure to file her bill until more than one year after the grant of letters of administration;" and (2) that "the existence of the alleged contract has not been proved with that certainty required in cases of this character."

There is very little dispute as to the material facts.

An outline of the evidence is, in substance, that the complainant is a natural daughter of Batysta, and was born in Austria-Hungary on September 23, 1894; that at the time of her birth Batysta was a citizen of Austria-Hungary; that one year after her

birth Batysta came to the United States, located in the city of Chicago and engaged in business; that the complainant remained in Austria-Hungary with her grandmother; that in the early part of the year 1912 Batysta went into business with a Mrs. Anna Hanus, who testified in the case under the name of Anna Hynes; that she lived with him as his housekeeper; that about this time Batysta was anxious for the complainant, who was 17 years of age, to come to Chicago and live with him; that at first she refused to come; that he wrote to her asking her to come, and told her that he was going to leave her all of his property after his death; that he sent her a steamship ticket and money to cover her expenses; that she came to Chicago and lived for a time with Batysta; that she left Batysta's home and worked as a maid servant, giving as her reason for leaving that her father's housekeeper was very mean to her; that while she was employed as a maid servant Batysta visited her, and their relations were pleasant; that on November 13, 1919, Batysta was adjudged insane, and that on December 2, 1919, he died; that in the early part of November, 1919, before he was adjudged insane, he consulted an attorney in regard to his affairs; that he told the attorney that he was living with a woman to whom he was not married; that Batysta asked the attorney to prepare a will for him bequeathing his property to this woman, but afterwards decided not to make a will; that on November 3, 1919, the attorney went to see Batysta, who was then in a hospital, and that Batysta said to the attorney, "I want this property we own together to go to Mrs. Hanus, and you draw up some kind of a paper so that I will sign it, and she will have it in her possession in case something happens to me before this deal is closed;" that the attorney prepared the following document, which Batysta signed:

"To Whom It May Concern:

This is to certify that Robert Batysta and Anna Hanus are in partnership, as joint tenants, and have been for the past number of years, each contributing his or her services to the

joint tenancy partnership and sharing equally in the fruits thereof; that is, each is entitled to one-half of the property, real or personal, and upon the death or incapacity of the one or the other all the property shall become the sole property of the survivor to hold as his or hers forever. I now give to Anna Kanus all the my property situated in South West State Bank, 51st & Ashland, Chicago, and deliver to her the keys to the same; and all my other property wherever situated.

Robert Batysta (Signed)

Witnesses:
Leon Andel (Signed)
Vaclav Koutecky (Signed.)"

The evidence further shows that Batysta did not give the complainant any of his property before his death, and that he died without making a will; that at the time of his death Batysta left personal property of the value of approximately $22,000.

The contention of counsel for the defendant, Emily Spicka, that the failure of the complainant to file her bill for specific performance until more than one year after the grant of letters of administration, bars her right to the inventoried estate of Batysta, is based on Section 70, Chapter 3 of the Illinois Statutes relating to the Administration of Estates. The pertinent part of section 70 is as follows:

"All demands against the estate of any testator or intestate shall be divided into classes in the manner following, to-wit:--- Sixth. All other debts and demands of whatever kind without regard to quality or dignity which shall be exhibited to the court within one year from the granting of letters as aforesaid, and all demands not exhibited within one year as aforesaid shall be forever barred unless the creditors shall find other estate of the deceased not inventoried or accounted for by the executor or administrator."

Counsel for the defendant, Emily Spicka, maintains that the suit of the complainant is a debt or demand against the estate of Batysta within the meaning of paragraph 6 of section 70.

In our opinion the suit of the complainant does not constitute a debt or demand against Batysta's estate. The complainant is not proceeding on the theory that she has a debt or demand that should be paid out of the estate. The scope and purpose of the complainant's bill is to recover the entire estate. She is not

asking the court as a claimant against the estate to allow a debt or demand against the estate. She is invoking the aid of a court of equity to obtain the entire estate, which she alleges she is entitled to by virtue of a contract. She is not claiming that she has a debt or demand for a specific amount against the estate. She is asserting a right of ownership to the entire estate itself. The relationship existing between the estate and the complainant is not merely the strict relationship of debtor and creditor. It is a relationship based on equitable principles growing out of the alleged contract between the complainant and Batysta. From the views that we have expressed, it follows that the right of action of the complainant reasonably should not be termed a debt or demand within the meaning of paragraph 6 of section 70.

The conclusion that we have reached is supported by the following analogous cases: Evans v. Moore, 247 Ill. 60; Gillett v. Hickling, 16 Ill. App. 392; Oles v. Wilson, 57 Colo. 246.

Counsel for the defendant, Emily Spicka, relies on the following cases: Smydacker v. Swan Land Co., 154 Ill. 280; Morse v. Pacific Ry. Co., 191 Ill. 556; Hales v. Holland, 92 Ill. 494; Morse v. Gillette, 93 Ill. App. 23; and Estate of Julia Downing, 236 Ill. App. 168. We do not think those cases are in point. In none of them was there any claim of ownership of the entire estate. The right of action in all of them proceeded on the theory of a claim against the estate and payable out of the estate. In all of them only the strict relationship of debtor and creditor existed between the estate and the claimant, and no equitable rights such as are shown in the case at bar were involved.

In considering the contention of counsel for the defendant, Emily Spicka, that the contract has not been clearly and unequivocally proved, it will be necessary to state the evidence in detail, as each case of specific performance must be determined

largely on its own special facts. Kempel v. Hughes, 235 Ill. 424, 431.

The contract on which the suit of the complainant is based was not a formal written document. It was partly written and partly oral. The written part of the contract consisted of a letter from Batysta to the complainant. The letter was not produced. The only direct evidence of the existence of the letter is the testimony of two witnesses for the complainant - Vincent J. Klaus and Marie Drahankobil. However, there are facts and circumstances in evidence which tend to corroborate their testimony; and there is no evidence which directly contradicts their testimony.

Vincent J. Klaus testified on behalf of the complainant that he was engaged in the steamship business, foreign exchange and fire insurance business at 43th and Ada streets; that by the steamship business he meant that when a man wanted to come to this country from Europe he, Klaus, arranged for the passage across the ocean and for railroad tickets for the connecting company; that he was well acquainted with Batysta; that he had known him for about 13 years; that he was not related to Batysta and had no interest, pecuniary or otherwise, in this suit; that Batysta had a meat market just on the next corner to him, and was in business there about 8 or 10 years; that Batysta was in his, Klaus', place several times a day; that he talked to him, Klaus, about his family affairs; that he said he had children on the other side; that he talked about the complainant at least six times; that on one occasion his, Klaus', sister-in-law, Marie Drahankobil, was present; that at that time Batysta said that he wanted to send $50 for traveling expenses for his daughter; that before that he had bought steamship tickets; that Batysta said that she did not answer his letter; that "she was funny;" that he, Klaus, said, "Wait until she answers;" that Batysta said, "No, I write her a letter; here it is. Give me $50 and send it to Europe and you can

look over it;" that he, Klaus, looked at the letter and said, "I think that she come;" that this was in May about 10 or 11 years ago; that Batysta said to him, "Here is the address," and gave him the money to send to her for traveling expenses and told him to look over the letter; that Batysta had previously said that he had a daughter in the old country and that he would like to have her here but that she did not answer his letters; that he said that if she was here she could stay by him and that after his death he "would leave all the property to her;" that Batysta said, "Now, I think this letter brought her up here quicker because I wrote here I got nobody here in this country, only she be the only one who is going to get all my money, my property after I am dead;" that Baytsta showed him the letter; that he, Klaus, read the letter and said, "I think she will come;" that he gave Batysta a five cent stamp; that Batysta put it on the letter and put the letter in the box; that he, Klaus, went with Batysta to the door and saw him mail the letter; that the mail box was right on the corner; that on one occasion when Batysta was going to California he came to his, Klaus', office and said, "Here is $6000; I am going to make a trip; in case something happened to me I don't want to lose the money. I got enough for my traveling expenses. Incase some accident happens to me give the $6000 to my daughter;" that the complainant had at that time left Batysta's home and was working as a maid in his, Klaus', family; that he, Klaus, said, "I want to call her;" that Batysta said, "No, that is all right. When I come back I want to take the money for my business;" that Batysta stayed in California 4 or 5 weeks and that when he came back he, Klaus, gave him back the $6,000; that Batysta would come to his, Klaus', house and ask, "How is my daughter;" that he, Klaus, saw Batysta kiss his daughter; that the complainant told him, Klaus, that the reason that she left Batysta's home was that Mrs. Hanus, Batysta's house-

keeper, was mean to her; that when the complainant came to Chicago from Austria-Hungary, Batysta told him, "Mine daughter is here;" that he, Klaus, talked with Batysta about his property both before and after the complainant came, and that Batysta would say, "Whatever I got, I don't want myself too much. I got no children, whatever I leave is for my daughter;" that at the time Batysta sent for his daughter, Batysta told him that he was worth considerable property; that Batysta had a farm and that he was making $25 to $30 a day in his business; that he had two clerks.

Marie Drahaskobil testified on behalf of the complainant that she was not related to the complainant, and was not interested in any way in the suit; that she is the sister-in-law of Klaus and lives in the same building in which Klaus lived; that she knew Batysta for about seven yearsand saw him nearly every day; that she remembers hearing a conversation in March or April, 1912, or 1913, between Batysta and Klaus in Klaus' place of business in regard to Batysta's sending money to the old country; that Batysta came there with a letter; that he said that he had sent transportation for his daughter but that she was not coming; that he said that he was all upset because she was not coming when he had paid transportation for her; that he was now sending a letter asking her to come and that when she should come that he will give her everything that he owns; that she did not see the contents of the letter; that Batysta did not show it to her or offer to show it to her; that he showed it to Klaus; that she saw Batysta put a stamp on the letter and seal the letter; that she was present when Batysta gave Klaus $6000 before Batysta went to California; that Batysta said, "Well, Klaus I am going away. I have a daughter here, so I will leave $6000 for her. If anything happened to me give the money to her. Should nothing happen I will take the money back again;" that she, the witness, said, "Don't give the money to Mr. Klaus, give it to

her. You are without any other;" that Batysta said that in America it is not customary to give children anything until after death.

Lydia Koscka testified on behalf of the complainant that she knew Batysta; that she had a daughter about twelve years old and Batysta used to say that he had a daughter about that age; that she was in Czecho-Slovakia and that he would bring her here and that if she would come everything would be here; that his property was going to be here; that after she came Batysta told the witness that she was his daughter; that she heard her call Batysta "Pa." On cross-examination the witness was asked this question: "And didn't he also tell you that he wanted her to come here to Chicago so as to do housework?" The witness answered, "No, he didn't say that, he said he would bring her here so that since he didn't have her when she was young he could have her in later years for his joy."

Louise Koscka testified on behalf of the complainant that she was the daughter of Lydia Koscka; that Batysta's place of business was right across the alley from her father's; that she saw Batysta nearly every day while her father was in business there; that she heard Batysta tell her mother that he had a daughter in Europe and that he was going to bring her here; that afterwards he showed us some bills and said he had sent for her and that everything would be here; that after she came Batysta introduced her as the daughter he sent to Europe for; that she, the witness, heard her call Batysta father; that during the six or seven weeks that she was living with him Batysta always said that he was going to give her his property.

On behalf of the defendants, Anna Hynes (also referred to as Anna Hanus) testified that from March 12, 1912, to December 2, 1919, she was the housekeeper and business partner of Batysta; that the complainant came to Chicago from the old country in June or

her. She was without any reluctant that Dorothy would find in Annette
it is not necessary to give additional explicit notes about Annette.

Lydia Gaston inquired on behalf of the council about
that she hope Dorothy that she had a daughter about feeling young
all and Dorothy used to say that he had a daughter about that any
that she was to Gaston-Cleveldon and that he would doing her there
and that if she would make everything would be honey that him.
presently was going to be honey that either she some Dorothy that
the things that she was die thoughtfully that she lamed her only
Dorothy "Ja." He cross-examination the witness was asked this
question: "And didn't he also tell you that he wanted her to be
more care to change so as to be honeymoon?" The witness answered,
"Ja, he didn't say that, he said he would taking her here so that
since he didn't have her when she was young he could have her for
later years for his joy."

Gaston inquired on behalf of the complainant
that she was the daughter of Lydia Gaston that Dorothy's plans of
happiness was right across the river from her father's, that she
was flirting usually every day while her father was in business trouble
that she heard Dorothy said her mother that so that a daughter in
Dorothy had that he was going to bring her home. Witness otherwise
he Edward so some little and said to had even the how not that
everything would be honey that after she some Dorothy lamentation
had so the daughter to meet in Europe Dr. that she was, her relation
heard her call Dorothy Fontenay that during life she or three years
that she was living with the Dorothy always well that to was going
to give her his property.

In behalf of the defendants, was Irene Long testified
to be Irene Gaston testified that from March 17, 1918, to December 9,
1919, she was the housekeeper and business partner of Dorothy; that
the complainant came to Chicago from the old country in June or

July, 1912; that Batysta sent her a steamship ticket; that when she first came to Chicago she lived at the home of Batysta; that she was there only a few days and then left because of a quarrel that she had with Batysta about doing housework; that she returned two or three months later, stayed only six weeks and left again, when she, the witness, asked her to wash some clothes.

Frank Pich, a witness on behalf of the defendants, testified that he was working for Batysta when the complainant came to Chicago; that she came to Batysta's house from the depot; that he does not know how long she stayed; that before she came Batysta told him that he was going to pay his daughter's way from the old country; but that he "did want to pay the money and she should come out;" that that was all he said; that "then he say he received a letter she is coming;" that "the mail man came and gave him a letter and he opened it and said, 'Here is a letter from the girl, she is coming.' That is all;" that when she came he said he was glad that she was here; that he said that she was tired after the trip; that she should "lay off from the work for a few days, get rested up, dressed up, washed up" and then to "work about the house;" that the complainant said either to him, the witness, or his wife, that she did not come here to work; that he never heard Batysta say that he was going to give the complainant anything out of his property. The witness was asked this question: "Did you see the letter that he [Batysta] received from his daughter?" The witness answered, "I saw the letter but I never got a chance to read the letter."

Nick Zorka, a witness on behalf of the defendants, testified that he was acquainted with Batysta and the complainant; that he knew the complainant before he knew Batysta; that on one occasion he said to Batysta, "Your daughter she lived at my house on the west side and boarded in my house;" that two or three years afterwards, along in 1908, he heard Batysta wanted to sell his

butcher shop and he want to see him. Batysta asked, "Where is my daughter now; don't you know anything about her?" that he, the witness, said, "No, not for about a year;" that Batysta said, "If she worked and stayed with me I give her everything, and if she don't stay with me she don't get anything;" that Batysta also said, "I am so sick last week and I have two doctors and I called up for her and she did not show up."

Joseph W. Money, on behalf of the defendants, testified that he was a lawyer; that on October 31, 1920, he was called to Batysta's home to see Batysta; that Batysta wanted him to prepare a will; that he wanted Mrs. Hanus [also referred to as Mrs. Hynes] to get all of his money because she was entitled to it; that he was not married to her but that they had lived together for eight years; that she had gone into business with him and had put money in the business; that the business was a success; that they had agreed that upon the death of either the property was to go to the survivor; that he, the witness, was called to Batysta's home the next morning and that Batysta said he was feeling better and had changed his mind; that instead of making a will he would buy a farm and leave that to her; that he bought the farm and told Mrs. Hanus in the presence of the witness that the farm was for her; and that he hoped that she was satisfied; that when Batysta was in the hospital he said he wanted all of his property to go to Mrs. Hanus, and requested the witness to draw up the document that we have previously set out.

James A. Calek on behalf of the defendants testified that he was the vice-president of the Southwest State Bank; that he had known Batysta about fifteen years; that about November 3, 1919, Batysta came to his office with a young lady who Batysta said was his daughter; that Batysta had some securities in a package; that he signed an agreement for a rental box, put the securities in the box and said that he, the witness, should permit Mrs. Hanus to go

to the box as a co-renter; that Batysta said he intended to marry Mrs. Hanus to protect her rights, because she helped him to save his money; that Batysta also said he was going to buy his daughter a coat.

Fred Martinek, a witness on behalf of the defendants, testified that he had known Batysta for many years; that Batysta said Mrs. Hanus was a good housewife, and that when he got her they made money; that Batysta said he was going to bring his daughter to this country; that when she came Batysta told him many times that he was going to see his daughter; that on one occasion he said he was going to buy her a coat and he was going to fix her up; that he heard Batysta say that he was going to give Mrs. Hanus the biggest part of his property and was going to fix up his daughter; that he was going to take care of those two women, and that he always favored Mrs. Hanus; that at the time his daughter came to this country Batysta had a cottage at Brighton and a little money in his business; that he was probably worth about $5,000; that this is his, the witness', notion; that Batysta never told him just exactly how much property he had.

Edward Klinenberg on behalf of the defendants testified that Batysta told him that he had a daughter in the old country and asked him the best way to bring the child over; that at this time Batysta was living with Mrs. Hanus; that Batysta said he wanted his daughter to help him in the business and to help Mrs. Hanus; that he does not think that there was ever a time that he saw Batysta that Batysta did not say something about his daughter; that on one occasion he said he had bought her a coat and different things; that Batysta told him that the girl had had trouble with Mrs. Hanus and left; that Batysta never told him in what manner he would dispose of his property.

C. D. DeWitt, a witness on behalf of the defendants,

testified that he was a post office clerk in charge of the records where the collection boxes were located; that prior to August 18, 1922, there was no mail collection box at the corner of 48th and Ada streets in Chicago; that the closest box was a block away at Loomis and 48th streets.

The complainant testified in regard to receiving the letter in question, but the court excluded the testimony on the ground that under section 2 of chapter 51 of the Illinois statutes relating to Evidence and Depositions, the complainant was not a competent witness.

It is contended by counsel for the defendant Emily Spicka that "the alleged contract stands upon no better basis than if it were an oral contract;" and "that sufficient proof has not been shown."

Assuming for the sake of argument that the contract should be considered an oral contract, and that under the rule relating to the specific performance of such a contract, all of the terms of the contract must be clearly and satisfactorily proved. (Aldrich v. Aldrich, 287 Ill. 213, 222), yet it is also the rule that the contract may be proved by other than direct evidence; and that where facts, including the act of the parties, raise a convincing implication that the contract was actually made, and satisfy the court that its terms and provisions are sufficient to justify its enforcement, the contract should be upheld. Aldrich v. Aldrich, supra, (p. 222); Willis v. Zorger, 258 Ill., 574, 578, 579.

In the case at bar we are of the opinion that the contract has been clearly and satisfactorily proved and that the complainant is entitled to have it specifically enforced.

Counsel for the defendant Emily Spicka has cited numerous cases to support his contention that the evidence in the case at bar is insufficient. The case on which he principally

relies is the case of Davier v. Kaiser, 250 Ill. 334. We think that the facts in all of the cases are materially different from the facts in the case at bar.

In the case of Zempel v. Hughes, 235 Ill. 434, the court said (p. 431):

> "No inflexible rule can be laid down to control the specific enforcement of contracts in equity. Every case must necessarily depend and be determined on its own special facts."

In the case of Davier v. Kaiser, supra, cited by counsel for the defendant Emily Spicka, the court held that the terms of the contract were unreasonable and unnatural. In the case at bar we think that the terms of the contract are reasonable and natural.

Counsel for the defendant Emily Spicka further contends that there is no adequate consideration to support the contract. We think that the consideration for the contract was that the complainant should leave her home in Austria-Hungary and come to Chicago to live.

In the case of Evans v. Moore, supra, in discussing the question of the consideration, the court said (p. 69):

> "The consideration for the agreement was that complainant should leave his parents, brothers, sisters and other relatives, renounce allegiance to the land of his birth, come to this country to live and become a citizen of the United States. It was not a case of a promise to make a gift without consideration, but was an agreement made upon a legal, valid consideration, and when performed by complainant the agreement became binding upon David L. Evans and the law imposed upon him the obligation of performing it."

Counsel for the defendant Emily Spicka further contends that the evidence does not show that Batysta's letter to his daughter was addressed and mailed; that the testimony of Klaus that he saw it mailed is contradicted by the testimony of the postal clerk, DeWitt, who testified that there was no collection box at Ada and 48th streets at the time in question; that the closest box was a block away at Loomis and 48th streets.

We think that the reasonable inference from all of the evidence is that the letter was properly addressed and mailed; and we do not think that the evidence shows a contradiction of Klaus' testimony in regard to the mailing of the letter. Klaus did not testify that he saw the letter mailed in the box at Ada and 48th streets. He testified that he saw Batysta drop it in the mail box "on the next corner." Furthermore, independently of Klaus' testimony in regard to seeing the letter mailed, we think that when all of the other evidence is considered, the inference is clear that the letter was in fact mailed. The evidence both on behalf of the complainant and the defendants shows that Batysta was constantly talking about getting the complainant to come to Chicago to live with him; that he told his friends that he had asked her to come, but that she would not do so; that later he told his friends that she was coming; that she did come. Clearly, Batysta must have done something to induce her to change her mind. The only probable method by which Batysta could communicate with her was by mail. Frank Pick, a witness for the defendants, testified that he saw Batysta receive a letter and that Batysta opened it and said, "Here is a letter from my girl; she is coming." The only probable inferences from the receipt of this letter by Batysta are that the letter was in answer to a letter she had received from Batysta and that Batysta's letter promising to bequeath his property to her had induced her to come. It is a fair inference, even from the evidence on behalf of the defendants, that she did not come with the expectation of assisting Mrs. Hanus in doing the housework, since the evidence on behalf of the defendants shows that she left Batysta's home because of a quarrel with Mrs. Hanus in regard to the housework. The probable reason why the complainant changed her mind and came, in our opinion may be found in the testimony of Klaus and Marie Drahankobil that Batysta told the complainant that he would bequeath her all of his property if she came.

We do not think that the strength of this conclusion

is weakened by the evidence which the defendants introduced to show that there was an estrangement between the complainant and Batysta after the complainant came to this country, and by the further evidence introduced to show that at the time he wrote the letter in question Batysta intended to bequeath his property to Mrs. Hanus. In our view, the evidence shows that there was no estrangement between the complainant and Batysta, and there was no intention on the part of Batysta at the time that he wrote the letter in question to the complainant to bequeath any of his property to Mrs. Hanus.

Counsel for the defendant Emily Spicka further contends that at the time that it is alleged that Batysta wrote the letter in question to the complainant, Batysta "had little or no funds;" that when he died he had "a considerable estate;" and that on the authority of the case of Wallace v. Happleys, 103 Ill. 229, the changed circumstances between the time of making the alleged contract and the time of his death constitute sufficient grounds to defeat the right of the complainant to have the alleged contract specifically performed.

Since we are of the opinion that the evidence clearly and satisfactorily shows that Batysta made the contract, and since we further think that the contract was fair and equitable, it is immaterial whether there was a material change of Batysta's financial condition after he made the contract. In the case of Aldrich v. Aldrich, supra, in discussing a question similar to the one in the case at bar, the court said (p.221):

> "Counsel for appellees claim it [the property in controversy] was worth $100 an acre at the time of the trial, while counsel for appellant insist that it was not worth that amount, but argue that even if it was worth that amount at the time of the trial it was worth much less at the time the contract was entered into, and that this court has held that if a contract was fair and equitable when it was made it could not become unfair and inequitable by circumstances which might afterwards arise."

Furthermore, the evidence in the case at bar is not clear as to Batysta's financial worth when he made the contract. We

think that at that time on a fair interpretation of the evidence it may be said that he had substantial means for a man of his station in life; and that the change in his financial condition was not of such proportions as to defeat the complainant's right to specific performance. In the case of Wallace v. Rappleye, supra, cited by counsel for the defendant Emily Spicka, the value of the property at the time the contract was made was $12,000 and at the time of death about $350,000. The court said in that case that the alleged contract was not satisfactorily proved by the evidence, and that the consideration for the contract was inadequate.

Counsel for the defendant Emily Spicka further contends that the chancellor erred in ordering that the expenses and solicitors' fees of the guardian ad litem should be taxed in the bill of costs. Counsel maintains that the chancellor should have directed that the expenses and solicitors' fees should be paid out of the estate of Batysta.

Counsel for the complainant contend that under the equitable jurisdiction of the chancellor, the question was one for the exercise of his discretion and that he has not abused his discretion.

Neither counsel for the defendant Emily Spicka, nor counsel for the complainant has argued the question fully nor cited any authorities on the question. In this situation we think that we are justified in holding that the question has been waived. Harding v. The People, 202 Ill. 122, 124.

For the reasons stated the decree is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

35 - 30840

MINA KAPLAN, Defendant in Error, vs. JOSEPH KAPLAN, Plaintiff in Error.	ERROR TO CIRCUIT COURT OF COOK COUNTY.

244 I.A. 625

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a writ of error prosecuted by Joseph Kaplan, the defendant, to review a decree in favor of Mina Kaplan, the complainant in a suit for separate maintenance.

The defendant asks for a reversal of the decree on two grounds: First, that the chancellor committed reversible error in allowing the original bill of complaint to be amended to show that the defendant was a resident of Cook county, Illinois; and second, that there is no certificate of evidence, and the decree does not recite the facts.

The amendment in question was allowed and was made before the entry of the final decree. In this state of the record the amendment was properly allowed by the court. It is unnecessary to discuss this question, as the precise question has been decided adversely to the contention of counsel for the defendant by this court in two very recent cases in carefully considered opinions written by Mr. Justice Matchett. Plotnitsky v. Plotnitsky, 241 Ill. App. 166, 168; Nellesen v. Nellesen, 239 Ill. App. 622.

In regard to the question whether a certificate of the evidence was necessary, we are of the opinion that a certificate of evidence was not necessary, as the decree contains findings of fact which are sufficient. The findings of fact in the decree which we consider sufficient are as follows:

"And the court doth further find that the parties hereto were lawfully joined in marriage on or about the first day of June, 1908, at Poland, Russia, and that as a result of said marriage there were born two children, Leon, now about sixteen years of age, and Hyman, now about thirteen years of age, both living and who have been and are now under the care, custody and control of the complainant;

"And the court does further find that subsequent to their intermarriage on or about the 15th day of April, 1921, the defendant, Joseph Kaplan, willfully deserted and absented himself from the complainant without reasonable cause for the space of over two years immediately prior to the filing of the bill in this cause and that the said complainant, Mina Kaplan, has been and is now living separate and apart from the said defendant, Joseph Kaplan, without fault on her part as charged in the complainant's amended bill of complaint.

"And the court does further find that the said defendant, Joseph Kaplan, did on April, 1921, wilfully abandon, desert and absent himself from the complainant at Akron, Ohio, where the complainant and the defendant were living as husband and wife; and that the said defendant, Joseph Kaplan, at said time came to Chicago, Cook County, Illinois, and that since that time he has been living in the said City of Chicago, where he has been engaged in business, and has been since the filing of the amended bill of complaint and was upon the date of the hearing, a resident of Chicago, Cook County, Illinois;

"And the court does further find that the said Joseph Kaplan is well able to support and maintain the complainant, Mina Kaplan, and her said children;

"And the court does further find that there is now past due and owing to the complainant, Mina Kaplan, from the defendant under an order of court heretofore entered for temporary alimony, the sum of $63.00 and the further sum of $35.00 for temporary solicitors' fees."

For the reasons stated the decree of the chancellor is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

228 - 31047

JACOB J. MENDELSOHN, PHILIP MENDELSOHN and MEYER SOLOMON, Complainants, vs. MORRIS GOLD and NICHOLAS J. PRITZKER, Defendants. NICHOLAS J. PRITZKER, Appellant.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

244 I.A. 628[4]

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Nicholas J. Pritzker, one of the defendants, from a decree in favor of Jacob J. Mendelsohn, Philip Mendelsohn and Meyer Solomon, the complainants, in a suit in equity brought by the complainants against Pritzker and Morris Gold.

The suit was brought to enjoin the foreclosure of a chattel mortgage given by the complainants to Gold for the purpose of securing the payment of 36 promissory notes of the complainants payable to Gold, aggregating $20,500, the mortgage and notes having been delivered, as the complainants allege, in escrow to Pritzker; further to enjoin the assignment or the transfer of the notes and mortgage; further to compel the surrender of the notes for cancellation; and further for an accounting.

The decree of the chancellor adjudged that the chattel mortgage and the notes are void as against the complainants, and ordered the defendants to deliver these instruments to the complainants; the decree further adjudged that Pritzker is indebted to the complainants in the sum of $6534.37, and ordered Pritzker to pay that amount to the complainants; the decree further found that Gold is indebted to the complainants in the sum of $1000 which was paid by the complainants to a broker on behalf of Gold,

and ordered Gold to pay that amount to the complainants; that decree further adjudged that the bill of sale was void and ordered it cancelled; the decree further ordered Pritzker and Gold to pay the costs and expenses of the suit, amounting to $720.90, one-half to be paid by Pritzker and one-half by Gold.

An outline of the undisputed evidence is as follows: Gold and his wife were the owners of all of the stock in a corporation by the name of the Somerset Hotel Pharmacy, with the exception of one share of stock which was held by A. N. Pritzker, a son of the defendant Pritzker. The pharmacy was located in the building of the Somerset hotel under a lease from the Shoreham Hotel Building Company, the owner of the Somerset Hotel. In the lease the drug store was referred to as "the corner store in the Somerset Hotel." Negotiations were begun between the complainants and Gold and his wife for the purchase of the drug store by the complainants. The first meeting was held at the drug store May 11, 1923. There were present the complainants, the defendant Gold, the broker in the transaction named John Krone, Herman M. Mendelsohn, brother of the complainants Jacob J. and Philip Mendelsohn, and also their attorney. A written agreement was entered into for the purchase of the drug store and the lease for the sum of $20,500. On the signing of the agreement the complainants paid $1500 as a deposit to Krone, $1200 of which was to be retained by Krone as his commission. After the meeting at the drug store all of the parties on the same day went to the Covenant Club and there met the defendant Pritzker and Peter Sissman, an attorney representing the complainant Solomon. From the Covenant Club all of the parties on the same day went to the office of Herman M. Mendelsohn. The agreement was submitted to Pritzker and Sissman. Pritzker stated that a modification would have to be made; that Gold had $8000 on deposit with the lessor of his lease as a guarantee for the performance of the lease and that the

$8000 should be added to the purchase price and should be paid as the cash payment. This was agreed to by all the parties. It was further agreed that arrangements would have to be made to comply with the Bulk Sales Law. All of the parties met again on the evening of the same day at the drug store. At this meeting Pritzker stated that he had been in consultation with Mrs. Gold, that she objected to the sale, and that as far as he was concerned the deal was off unless her consent was obtained. The next meeting, at which all the parties were present, was held May 14th at Pritzker's office. Gold stated that his wife had agreed to the sale at the purchase price of $25,000 with a cash payment of $8,000. At this meeting the plan of transferring to the complainants the stock of the Somerset Hotel Pharmacy was discussed and the necessary corporate minutes and other papers were prepared.

On May 15th all the parties except Gold, who was ill, met at Pritzker's office. At this meeting it was decided to abandon the plan of transferring the stock of the Somerset Hotel Pharmacy to the complainants and to make the sale as an individual sale and not a corporate sale. The papers were changed accordingly. Also at this meeting Pritzker wrote on the back of the lease the form of the assignment of the lease by Gold to the complainants, and also the form of the acceptance of the assignment by the complainants.

On the night of May 15th Pritzker took the lease with him to Gold's home and had Gold execute the assignment of the lease to the complainants. That night Gold was taken to a hospital where he remained until June 2nd.

On May 16th there was a meeting at Pritzker's office, at which Pritzker, the complainants Mrs. Gold, Sissman and Herman N. Mendelsohn were present. The complainant Jacob J. Mendelsohn

was not present at the first part of the conference, but arrived before the conference closed. Krone and Gold were not present. At this meeting it was agreed that Pritzker should hold the notes and chattel mortgage, also the cash payment of $6500 to be made by the complainants and also $500 to be paid to Pritzker by Krone of the $1500 previously deposited with Krone by the complainants; and the notes, mortgage and the $6500 thereupon were delivered to Pritzker. On the next day Krone delivered to Pritzker the $500. At the meeting of May 16th Pritzker prepared the following receipt:

> "May 15, 1923.
> Received of Philip Mendelsohn, Dr. Meyer Solomon, and Jacob J. Mendelsohn the sum of $8,438.10 in cash; Chattel Mortgage and Notes aggregating $20,500.00 to be held by undersigned until all of the debts and obligations of the Somerset Hotel Pharmacy have been made. It is understood that I may use cash or notes as the case may require in payment of said obligations from the amount so deposited with me."

Although the receipt shows the sum of $8438.10, Pritzker in fact received only $7000 cash. Included in the amount of $8438.10 was the $1000 remaining in Krone's hands and $438.10 for which the complainants were to be credited in connection with the adjustment of rents, electric light bills and water bills.

It was agreed at the meeting on May 16th that Pritzker could use the money in his hands to pay the creditors of the drug store in compliance with the Bulk Sales Law. Pritzker immediately began to pay the creditors with the money. Among the payments Pritzker made to creditors was a payment made to himself on May 16th of $5119.61, which amount Gold owed to Pritzker on a note of Gold for $5000 with interest, which Pritzker had endorsed and which was secured by a chattel mortgage on the Chateau Pharmacy, another drug store owned by Gold. The note was held by the Home Bank & Trust Company, which on May 14th had charged Pritzker's account with the note.

On May 17th or 18th Pritzker sent the bill of sale

and the lease to Sissman, who in turn sent them to Herman E. Mendelsohn. Gold's assignment of the lease to the complainants was on the lease, but the lease contained no assignment to the complainants by the lessor, the Shoreham Hotel Building Corporation.

Philip Mendelsohn had taken over the management of the drug store about May 15th. He remained as manager until about June 3rd. It was agreed on the hearing of the cause that Frank Seward, who had been the manager of the drug store for Gold, would testify if he were present that on or about May 16th Philip Mendelsohn asked him if he would work for him "half time;" that Seward agreed to do so and continued to work for Philip Mendelsohn until a custodian took charge of the drug store under the chattel mortgage. On May 21st or 22nd federal prohibition officers seized some intoxicating liquor that was in the drug store. This affair is referred to as a "raid."

On May 24th all of the parties except Gold, who was still sick in a hospital, met at Pritzker's office. Pritzker stated that the attorneys for the Shoreham Hotel Building Corporation were "disquieted about the raid" and that the hotel company was going to terminate the lease. It was agreed at this meeting that the complainants should pay the June rent for the drug store amounting to $625. The complainants gave a check for that amount but the check was not paid, as the complainants' account at the bank on which the check was drawn was closed by the complainants.

On June 3rd or 4th some one representing Gold took possession of the drug store under the chattel mortgage which had been given to Gold by the complainants.

On June 9th the drug store was sold under the chattel mortgage. The sale was conducted by Pritzker's son, A. E. Pritzker. The drug store was bid in by A. N. Pritzker on behalf of Gold for $14,500.

[illegible]

[illegible]

[illegible]

The principal questions of fact in dispute are (1) whether Fritzker or Gold agreed to obtain the consent of the lessor, the Shoreham Hotel Building Corporation, to the assignment of the lease by Gold to the complainants; (2) whether it was agreed that the sale of the drug store was to be a conditional sale depending upon the obtaining of the consent of the Shoreham Hotel Building Corporation to the assignment of the lease; (3) whether the money, notes and chattel mortgage were delivered in escrow to Fritzker to be held by him until the sale was consummated; (4) whether Philip Mendelsohn took over the management of the store under a consummated sale or merely pending the consummation of a sale; (5) whether the "raid" of the federal prohibition agents was made because of the violation of the prohibition laws while Gold was in possession of the drug store or because of the violation of the prohibition laws while Philip Mendelsohn was managing the drug store.

To state and discuss the evidence in detail relating to the disputed issues of fact would unduly extend this opinion. It is sufficient to say that the evidence is directly conflicting on all of these issues and cannot be harmonized; that if the evidence on behalf of the complainants is accepted as true, the sale was a conditional one, depending upon the obtaining by Fritzker or Gold of the consent to the lease of the Shoreham Hotel Building Corporation, and the money, notes and chattel mortgage were delivered to Fritzker on condition that Fritzker would hold them until the sale was consummated, provided that Fritzker might use the money to pay debts of the drug store in order to comply with the Bulk Sales law; that Philip Mendelsohn took over the management of the drug store for the convenience of all the parties, pending the consummation of the sale; that the raid by the federal prohibition agents was brought about because of the sale of in-

toxicating liquors by Gold while he was still in charge of the drug store.

On the other hand, if the evidence on behalf of the defendants is accepted as true, the sale was not a conditional sale but a consummated sale; that there was no agreement that the consent of the Shoreham Hotel Building Corporation to the assignment of the lease by Gold would be obtained for the complainants, either by Pritzker or by Gold; that there was no agreement that Pritzker would hold the money, notes and chattel mortgage until the sale was consummated, but that on the contrary they were delivered to Pritzker unconditionally; that Philip Mendelsohn took over the management of the drug store for the complainants as the result of a consummated sale of the drug store to the complainants; that the raid was due to the sale of intoxicating liquors by Philip Mendelsohn while he was managing the drug store.

We are confronted with the necessity of determining as an original question which version of the evidence we shall accept as correct, since in a chancery proceeding, according to the case of Chechik v. Koletsky, 311 Ill. 433, 438, the master's report, while prima facie correct, is of an advisory nature only, and "all the facts are open for consideration, in the first instance, of the trial court, and in case of an appeal, by the reviewing court."

The principal testimony on behalf of the complainants consisted of the testimony of the three complainants themselves, and the testimony of Sissman, Krone and Herman H. Mendelsohn. The chief witnesses for the defendants were the two defendants Pritzker and Gold. There was also documentary evidence introduced on behalf of the defendants.

After a careful consideration of all of the evidence we have decided to accept the testimony of the complainants as the correct version of the transaction, notwithstanding the fact that

there are circumstances in the testimony of Pritzker and also documentary evidence on behalf of the defendants which tend to support the defendants' theory of the case. The only criterion that may be used in determining the credibility of legal testimony is that of probabilities. And on probabilities we are constrained to hold that it is highly improbable that the complainants would have obligated themselves by a written agreement to purchase the drug store for $28,500, and to pay $8,000 of that amount in cash unless they had been positively assured by either Gold or Pritzker that the Shoreham Hotel Building Corporation would consent to the assignment of the lease to the complainants by Gold. The complainants were not buying merely the stock of goods and the fixtures of the drug store; they were buying the good will of the business as well. This is shown by the corporate minutes that were prepared by Pritzker, in which it was expressly recited that the good will was part of the assets to be purchased. The chief value of the good will depended upon the locality of the drug store. The fact that the drug store was located in the building of the Somerset Hotel undoubtedly enhanced the value of the business. The complainants manifestly expected to conduct the business in the building of the Somerset Hotel, where the business was located. The lease clearly was the principal asset of the purchase. In the circumstances the conclusion is irresistible that the complainants contracted for the purchase of the drug store only on condition that they could secure a valid lease to the premises.

It is not denied by the defendant Pritzker that the lease was an important asset, but he contends that the complainants themselves undertook exclusively to secure the consent of the lessor, the Shoreham Hotel Building Corporation, to the assignment of the lease. Such a contention is opposed to probabilities. It seems unreasonable to suppose that the complainants actually would

pay $8000 in cash, would agree to pay $20,500 more, and would depend upon their own efforts exclusively to obtain consent of the Shoreham Hotel Building Corporation to the assignment of the lease; in other words, that they would actually buy the drug store and take a chance on getting the consent of the Shoreham Hotel Building Corporation to the lease. It may be that Philip and Herman Mendelsohn spoke to Gertsner, the secretary of the Shoreham Hotel Building Corporation, in reference to securing the consent of that company to the assignment of the lease; but the probabilities are that the Mendelsohns did this gratuitously, not as part of the agreement. The testimony on behalf of the complainants is that Sissman said he would not be satisfied with Gertsner's consent or signature to the assignment; that Sissman insisted that the consent and the signature to the assignment of Crowen, the president of the Shoreham Hotel Building Corporation, should be secured by the defendants. This testimony seems highly probable, and accords with Sissman's testimony that he stated to Pritzker that the lease was the principal asset. Pritzker, however, testified that at the first meeting he stated that since the lease to Gold from the Shoreham Hotel Building Corporation provided that the lease could be assigned to a corporation by the name of the Somerset Hotel Pharmacy, and since Gold had changed the name of the original corporation to the name of the Somerset Hotel Pharmacy to comply with the lease, the consent of the Shoreham Hotel Building Corporation would not be necessary if, instead of purchasing the drug store from Gold as an individual transaction, the complainants would "take over" the Somerset Hotel Pharmacy Corporation and have Gold assign the lease to that corporation. Even if Pritzker's construction of the lease as stated in his testimony were correct, we do not think that his testimony weakens the probable inference that either he or Gold agreed to secure the consent of the Shoreham Hotel Building Corporation to the assignment of the lease. The

only safe course for the complainants to have pursued would have been to insist as a condition precedent to the consummation of the sale that Pritzker or Gold should obtain the actual consent of the Shoreham Hotel Building Corporation to the assignment, and not to depend upon Pritzker's legal opinion that the consent of the Shoreham Hotel Building Corporation to the assignment was unnecessary if the complainants would "take over" the Somerset Hotel Pharmacy Corporation.

Counsel for the defendant Pritzker argues that the undisputed evidence shows that the failure to get the consent to the assignment of the lease was due solely to the raid by the federal prohibition agents; that the raid was made because of the violation of the prohibition laws, not by Gold, but by Philip Mendelsohn, and that therefore the complainants consistently can not maintain that the failure to get the consent of the Shoreham Hotel Building Corporation to the assignment of the lease was due to the fault of Pritzker or Gold. We do not think that the evidence shows that the raid was made because of the sale of intoxicating liquors by Philip Mendelsohn. As we view the evidence the probable inference is that the raid was brought about by the violations of the prohibition laws while Gold was in the possession of the drug store and not while Philip Mendelsohn was managing the drug store. Furthermore, even if the failure to get the consent of the Shoreham Hotel Building Corporation to the assignment of the lease was due solely to the raid by the federal prohibition agents, and even if the raid was caused by violation of the prohibition laws by Philip Mendelsohn, and not by Gold, the defendants consistently cannot argue that the efforts of Gold and Pritzker to get the consent of the Shoreham Hotel Building Corporation to the assignment of the lease were frustrated by the raid, since Gold and Pritzker have taken the positive position that they did not agree to secure the consent of the Shoreham Hotel Building Corporation to the assignment of the lease. If, as the defendant Pritzker contends, the complainants themselves agreed to get the consent of the Shoreham Hotel Building Corporation to the assignment of the lease and failed, it is wholly irrelevant why the complainants failed.

only sole source for the complainants to have because would have been to insist as a condition precedent in the consummation of the sale that Intelsat or Gold should obtain the actual consent of the Sterling Legal Building Corporation to the assignment, and not to depend upon Intelsat's legal opinion that the consent of the Sterling Legal Building Corporation to the assignment was unnecessary if the complainants would "take over" the Sterling Legal Building Corporation.

Counsel for the defendant Intelsat argues that the undisputed evidence shows that the failure to get the consent to the assignment of the lease was due solely to the call by the federal prohibition agents that the raid was made because of the violation of the prohibition laws, and by Gold, but by Philip Bundelsohn, and that therefore the complainants particularly are not entitle that the failure to get the consent of the Sterling Legal Building Corporation to the assignment of the lease was due to the fault of Intelsat or Gold. We do not think that the evidence shows that the raid was made because of the sale of intoxicating liquors by Philip Bundelsohn. As we view the evidence the probable inference is that the raid was brought about by the violations of the prohibition laws while Gold was in the possession of the drug store and not while Philip Bundelsohn was managing the drug store. Furthermore, even if the failure to get the consent of the Sterling Legal Building Corporation to the assignment of the lease was due solely to the raid by the federal prohibition agents, and even if the raid was caused by violation of the prohibition laws by Philip Bundelsohn, and not by Gold, the defendants conclusively cannot argue that the efforts of Gold and Intelsat to get the consent of the Sterling Legal Building Corporation to the assignment of the lease were frustrated by the raid, since Gold and Intelsat both taken the positive position that they did not agree to secure the consent of the Sterling Legal Building Corporation to the assignment of the lease. If, as the defendant Intelsat contends, the complainants agreed to get the consent of the Sterling Legal Building Corporation to the assignment of the lease and failed, it is wholly irrelevant why the complainants failed.

In other words, if the complainants agreed to get the consent of the Shoreham Hotel Building Corporation to the assignment, it is immaterial to the defendant Pritzker whether the Shoreham Hotel Building Corporation put its refusal to consent to the assignment of the lease on the ground of the raid or on any other ground.

Counsel for the defendant Pritzker contends that the bill of complaint does not state a cause of action in equity, and in support of his contention relies on the case of Vanatta v. Lindley, 198 Ill. 40, 42. In that case the complainants were seeking the cancellation of a single promissory note alleged to be fraudulent or forged, and also seeking an injunction against the entry of a judgment on the note. The court held that the facts in that case were not sufficient to justify a resort to a court of equity; that the remedy at law was adequate.

The general rule is that in a proper case, where the defense at law is inadequate to promote the ends of justice and afford complete relief, a court of equity will require the surrender and cancellation of written instruments. Black v. Miller, 173 Ill. 489, 492.

In the case at bar there are 36 promissory notes and a chattel mortgage. If the notes should be transferred or sold by the defendants to different parties, a multiplicity of actions might be brought on the notes by the various owners against the complainants. Furthermore, the facts alleged in the bill show that there is no consideration for the notes; that the contract was not consummated and that the notes and the chattel mortgage are void; and the facts alleged in the bill also show that it would be inequitable in the circumstances for the defendants to claim ownership of the notes and chattel mortgage. Moreover, the bill prays for an accounting from Pritzker as to the disbursements that he made of the $7000 delivered to him, and also

In other words, if the said [illegible] agreed to get the consent of the Sherman Hotel Building Corporation to the assignment, it is immaterial to the defendant Feldman whether the Sherman Hotel Building Corporation had withheld its consent to the assignment of the lease on the ground of the [illegible] or on any other grounds.

Second, for the defendant Feldman contends that the bill of complaint does not state a cause of action in equity, and in support of his contention relies on the case of Goodwin v. Ladley, 188 Ill. 47, 56. In that case the complainants were seeking the cancellation of a certain promissory note alleged to be procured by fraud, and also seeking an injunction against the entry of a judgment on the note. The court held that the facts in that case were not sufficient to justify a resort to a court of equity; that the remedy at law was adequate.

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for an accounting on the part of the complainants for the moneys received by them while Philip Mendelsohn managed the drug store.

We are of the opinion that the allegations of the bill of complaint state a cause of action in equity. The specific grounds for equitable relief, as shown by the bill of complaint are (1) the right of the complainants to have the notes and chattel mortgage cancelled; and (2) the right of the complainants to have an accounting from Pritzker of the money that was delivered to him in trust.

The cancellation of instruments is classed in the exclusive jurisdiction of equity. 6 Cyclopedia of Law and Procedure, p. 286. We recognize the rule that equity will not exercise this power unless substantial equitable reasons are shown. 6 Cyclopedia of Law and Procedure, p. 286. In the case at bar in our opinion the substantial equitable reasons alleged by the bill of complaint are (1) that the 36 notes and the chattel mortgage are void because the contract between the parties was never consummated; (2) that the complainants may be subjected to a multiplicity of suits on the notes; (3) that there is no consideration for the notes and chattel mortgage; (4) that the notes and chattel mortgage having been delivered to Pritzker in escrow, Pritzker holds them in trust for the complainants; (5) that the complainants cannot obtain adequate relief at law.

According to the authorities the reasons we have stated constitute equitable reasons in the circumstances justifying the interposition of a court of equity to cancel the notes and the chattel mortgage. 4 Ruling Case Law, section 5, p. 490; section 11, p. 497; 9 Corpus Juris, section 70, p. 1196; 6 Cyclopedia of Law and Procedure, p. 288; House v. Bolen, 147 Pac. (Arizona) 736, 737.

We further are of the opinion that the bill of com-

plaint shows as an independent ground of equity that the complainants are entitled to an accounting from Pritzker as trustee of the money delivered to him. The People v.Bordeaux,242 Ill. 327,334.

Counsel for the defendant Pritzker contends that the "bill is fatally defective in not tendering back the drug store, the bill of sale and the lease, as well as Pritzker's receipt and agreement to act as escrow."

In support of this contention counsel cites the case of Huiller v. Ryan, 306 Ill. 88, 93. In that case the court held on a demurrer to the bill of complaint that the bill was defective in not making a sufficient tender of the consideration received under a contract which the complainants were seeking to rescind. In the case at bar if the objection in question had been urged on demurrer, the objection would have been well taken. But no demurrer was interposed by the defendants. In the present state of the record we think that the objection is without merit. The evidence shows that Gold is in possession of the drug store and that before he took possession the complainants offered to give him possession. The bill of sale was adjudged void by the decree, and was cancelled. The lease was ordered by the decree to be delivered to Gold upon demand by him or his duly authorized agent or attorney. The failure to tender Pritzker's receipt is obviated by the provisions of the decree requiring Pritzker to account for the money for which the receipt was given. In the circumstances, therefore, it would be unreasonable to reverse the decree because the bill of complaint is defective in the respects complained of by counsel for defendant Pritzker.

It is further contended by counsel for defendant Pritzker that "the bill having been brought to enjoin the foreclosure of the chattel mortgage, this was a re-affirmance of the purchase by the complainants of the drug store in question;" and

plaint alleges an on Independent's premise of equality that the constitutionality are entitled to an immediate stay pending an appeal of the money delivered in lieu. The People v.Ferdman,242 III. 327,334.

Damages for the unlawful detainer constitute just the "bill is tantamount discretion in not imposing even the stay stage, the bill of costs and the taxes, as well as reasonable counsel and attorney's fee and so ordered."

In support of this contention counsel quote the case of Quinlan v.Ryan, 288 Ill. 98, 99. In that case the court held on a demurrer to the bill of complaint that the bill was defective in not setting a sufficient number of the constitutional requirement under a warrant which the constitutionality upon petition to preclude. In the case at bar if the objection is available not being raised on demurrer, the objection would have been well taken. But on demurrer the intervenor by the defendant. In the present state of the record we think that the objection is without merit. The evidence shows that this bill is in pursuance of the only means and that which is not questionable the constitutionality effect in give the possession. The bill of suit was initiated with by his lawyer, and the execution. The lease was entered by the owner to be initiated to that upon behalf the lease or his duly authorized agent or attorney. The failure to enter Plaintiff's counsel is evident by the statutory of the lawyer requiring petitioner to account for the money for which the receiver was given. In the alternative, therefore, it would be unnecessary to stamps the income because the bill of complaint is defective in the possession complained of by another for petitioner filtrer.

It is further contended by counsel for defendant Petitioner that "the bill having been sought to obtain the discharge of the distant motorist, this was a proceeding of the purchase by the constitutionality of the long where in question; and

that "the complainants are now estopped from asserting the contrary and claiming relief inconsistent therewith."

We are of the opinion that these contentions are without merit. Since the essence of the bill is that there was no purchase of the drug store by the complainants because the sale was never consummated, we do not think that reasonably it can be contended that the prayer of the bill for an injunction against the foreclosure of the chattel mortgage implies a "re-affirmance of the purchase of the drug store by the complainants." Furthermore, the decree did not grant the prayer for an injunction. The complainants, therefore, have not obtained any relief that is inconsistent with the allegations in the bill that the drug store was not purchased by the complainants.

The question of estoppel is not involved, as it does not appear either from the pleadings or the evidence that the defendants suffered any injury by reason of the alleged inconsistency in the bill of complaint. If the objection in question had been urged on demurrer a different question might be presented.

Counsel for the defendant Pritzker contends as follows: "Even if Pritzker had made assurances to the complainants that the lessor of the drug store would consent to the assignment of the lease to the complainants, this was merely a statement of an expectation, or the expression of an opinion, or at most a promissory representation, and the failure to realize it was not ground for rescinding the sale of the drug store nor to cancel the chattel mortgage and notes."

We do not think that the evidence justifies this contention. In our opinion the preponderance of the evidence shows that Pritzker agreed to secure the consent of the Wheresham Hotel Building Corporation to the assignment of the lease and that the purchase of the drug store was not to be consummated unless

Pritzker obtained such consent.

Counsel for the defendant Pritzker further makes the following contention: "All the parol testimony that Pritzker had promised to hold the money, notes and mortgage on any conditions other than as stated by him in the writing by him signed and delivered to complainants * * was incompetent under the parol evidence rule, and should be disregarded, even if it were not denied by Pritzker and others."

It is argued by counsel for the defendant Pritzker that Pritzker was the agent only of Gold; that the rule is that the delivery of a deed or promissory note to an agent constitutes an absolute delivery to the principal; that an escrow can be delivered only to a stranger or third person not a party to the contract; that the delivery of a deed or promissory note to the agent or principal cannot be treated as a delivery in escrow, but is an absolute delivery; that where the delivery is to the agent or principal the rule is inflexible that parol testimony is inadmissible to show a contemporaneous agreement to the effect that the delivery of the deed or note should be treated as a delivery in escrow. Counsel cites numerous authorities to support his position.

Granting, for the sake of argument, that counsel has stated correctly the rules of law, these rules in our opinion are not applicable to the case at bar for the reason that in our opinion the preponderance of the evidence shows that Pritzker was not the agent only of Gold, but the agent of all the parties; and that the delivery of the documents in question to Pritzker was a delivery in escrow for the benefit of all the parties. In his own testimony Pritzker admitted he was holding the notes in escrow. He said: "I am only an escrowee. You got to deal with the principal. I am holding these only for the benefit of all parties,

[illegible]

[illegible] for the [illegible] [illegible] [illegible]

not for any one particular party, however good a friend of mine he may be." We think that the evidence shows he was also holding the money and chattel mortgage in escrow.

Counsel for the defendant Pritzker further contends that parol testimony was inadmissible to show that the bill of sale and lease were delivered to the complainants "upon a condition not expressed on their face;" that the rule is that "all conversation contemporaneous with or preceding the execution of a written instrument are all merged in the writing and are not competent evidence."

We do not think that this rule is applicable to the case at bar. The record does not show that the complainants, as parties to the lease and to the bill of sale, attempted to contradict or vary the terms of those instruments by parol testimony. The purpose of the parol testimony was to show that the bill of sale and the lease were to be held by Pritzker in escrow until the sale was consummated. The evidence does not show that the complainants accepted the bill of sale and the lease as an absolute delivery. The test in each case whether there has been an acceptance is the intention of the parties, and each case must be judged by its own facts. Hill v. Kreiger, 250 Ill. 408, 412. It was held in Mitchell v. Glem, 295 Ill. 150, 158, in regard to the question of the delivery of a deed, that it is competent to show that a deed, although in the hands of the grantee, had never been delivered, but something else was to be done before it should take effect.

In the case at bar it is a fact that Pritzker did send the bill of sale and the lease to Sissman, who in turn sent them to Herman M. Mendelsohn; but we think that the preponderance of the evidence shows that it was the intention of all the parties that Pritzker should hold those instruments in escrow, together with

the money, notes and chattel mortgage, until the consent of the Shoreham Hotel Building Corporation to the assignment of the lease had been obtained by Pritzker or Gold. The evidence shows that in a conversation between Sissman and Pritzker in regard to the bill of sale and the lease, Sissman stated that he had received the lease but that the lease did not contain the consent of the Shoreham Hotel Building Corporation to the assignment of the lease by Gold. Pritzker admitted in his testimony that the notes were delivered to him in escrow. We think that the evidence shows that the money and chattel mortgage were delivered to him in escrow; and we also think that the evidence shows that there was an agreement that he was to hold the bill of sale and the lease on the same conditions that he held the money, notes and chattel mortgage. In this view parol testimony was admissible to prove such an agreement. Gehy v. Reynolds, 260 Ill. 576, 583; Mitchell v. Glow, supra; Jordan v. Davis, 108 Ill. 336, 342.

Counsel for the defendant further contends as follows: "The failure to obtain the consent of the lessor to the assignment of the lease did not effect the completion of the transfer thereof to the complainants, nor did it violate any of the covenants in the assignment or bill of sale, but at most gave the lessor a right of election to declare it forfeited. The lessor alone could take advantage of that breach in terms of the lease."

These contentions of counsel may be granted to be true, but they are not pertinent to the case at bar since we are of the opinion that the preponderance of the evidence shows that the sale of the drug store was not to be consummated until the consent of the Shoreham Hotel Building Corporation to the assignment of the lease to the complainants had been obtained by Pritzker or Gold.

Counsel for the defendant Pritzker further contends

that the introduction in evidence by the complainants of certain documents executed by Gold after the filing of the bill of complaint, were not admissible against Pritzker and should be disregarded, even if it should be held that they were admissible as to Gold.

In answer to this contention it may be said that we have reached our conclusions on the evidence independently of the documentary evidence complained of.

Counsel for the complainants have assigned as a cross-error the method by which the chancellor computed the amount which he ordered Pritzker to pay to the complainants.

We are of the opinion that the computation of the chancellor was justified by the evidence.

For the reasons stated the decree of the chancellor is affirmed.

AFFIRMED.

McBurely, P. J., and Matchett, J., concur.

that the interpretation is criticism by the complainants of certain documents executed by them after the filing of the bill of complaint, were not admissible against defendants and should be disregarded, even if it should be held that they were admissible as to Smith.

It merely is that evidence it may be said that we have treated our consideration in the preliminary investigation of the documentary evidence complained of.

Reason for the conclusions here reached as a review after the manner in which the documents concerned this appeal which be argued fairness to any in the consideration.

We are of the opinion that the consideration of the documentary was justified by the evidence.

For the reasons stated the judgment of the complainant is affirmed.

AFFIRMED.

Rudgerly, C. J., and Dunnett, J., concur.

20 - 31118

SAMUEL STROBEL,
Defendant in Error,

vs.

J. J. INGELS,
Plaintiff in Error.

ERROR TO COUNTY COURT
OF COOK COUNTY.

244 I.A. 635

SUPPLEMENTAL OPINION BY MR. JUSTICE JOHNSTON.

On the petition for rehearing the only objection that need be noticed is that under sections 55 and 56 of the Practice Act the trial court was authorized to enter judgment on the plaintiff's affidavit of claim without the taking of testimony. We do not think that the plaintiff's affidavit of claim is sufficient. The declaration consists of two distinct causes of action, - one on the common counts, and the other on a breach of contract, in that the machines were not in accordance with the sample. In the special count the plaintiff alleges as a specific element of damage the $250 which he expended for repairing the machines; and also alleges a total damage of $650. The affidavit of claim alleges that the total amount due to the plaintiff is $650. The affidavit of claim could not be for a liquidated amount in excess of $250. The difference, therefore, between that amount and $650 would be unliquidated damages which could only be ascertained by testimony. In our view, sections 55 and 56 of the Practice Act contemplate an affidavit for liquidated damages.

20 - 31118

SAMUEL STROBL, Defendant in Error, vs. J. J. INGELS, Plaintiff in Error.	ERROR TO COUNTY COURT OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a writ of error prosecuted by the defendant to reverse a judgment by default obtained against the defendant by Samuel Strobl, the plaintiff.

The judgment order shows that the defendant was defaulted for failure to file an affidavit of merits; that after the default the court proceeded to assess the plaintiff's damages; that after hearing the evidence the court assessed the plaintiff's damages at the sum of $650.

The record shows that the defendant had entered his appearance before the judgment of default was entered.

According to the rule, the defendant was entitled to be present at the proceeding to assess the damages and to participate in that proceeding. Straus v. Nielsen, No. 30864, First Division Appellate court, opinion filed November 29, 1926, not yet reported; Williams v. Norton, 135 Ill. App. 112; Ostrobramy v. Barczaitis, 139 Ill. App. 95. In the case of Straus v. Nielsen, in an opinion written by Mr. Justice McSurely, the court said:

> "The defendants were not in complete default. Their default admitted the cause of action, but not the amount of damages. Consequently, under the rule, they were entitled to notice of the assessment of damages so that they might participate in the proceedings. In view of the number of suits in this county and the volume of business, this is a reasonable application of the rule."

On the authority of the case of Ostrobramy v. Barczaitis, supra, we are of the opinion that the defendant's

appearance became part of the record proper by the mere act of filing it; that a bill of exceptions was not necessary to show the filing of the appearance; and that it will not be presumed on the record in the case at bar that notice was given to the defendant to appear at the assessment of the plaintiff's damages.

For the reasons stated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

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[illegible] part of the event proved by the sole act of [illegible] [illegible] of [illegible] the [illegible] [illegible] the [illegible] of the [illegible] [illegible] [illegible] [illegible] [illegible] on the record is the case of but that action was given in the defendant to appear at the commencement of the plaintiff's campaign.

For the reasons stated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

[illegible], P. J., and [illegible], J., concur.

79 - 31204

FRANK P. COON, Appellant, vs. JANOWS & KRAMER CO., a Corporation, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

244 I.A. 626

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by Frank P. Coon, the plaintiff, against Janows & Kramer Co., the defendant, to recover $1198.51 alleged to be due to the plaintiff under a written contract between the plaintiff and the defendant in regard to the collection of claims by the plaintiff for the defendant.

On the motion of the defendant the trial court struck the plaintiff's statement of claim from the files on the ground that it was insufficient in law. The plaintiff elected to abide by the statement of claim.

Briefly stated, the statement of claim alleged that by the terms of a written contract the plaintiff was to handle the defendant's collections for "a commission of 25% on claims older than one year and on difficult claims; 50% on traced claims," and that "claims withdrawn" by the defendant "after date of entry are chargeable with" the plaintiff's "commissions as above;" that the defendant placed five claims with the plaintiff for collection [the specific amount of each claim being stated]; that the defendant withdrew these five claims from the plaintiff; that by the terms of the contract the plaintiff was entitled to a commission on each claim [the amount of each commission being specified], the total of said commissions amounting to $1224.11; that the defendant placed with the plaintiff for collection a claim for $34.13, which was a difficult claim, which the plaintiff collected, thereby

being entitled to a commission of $85.53; that the defendant is entitled to a credit of $25.60; that the total amount due to the plaintiff is the difference between $1224.11 and $25.60, namely, $1198.51.

It is contended by the defendant that the trial court properly struck the statement of claim from the files, as the plaintiff was not entitled to recover on the contract since the contract is void on the ground of public policy, for the reason that by the terms of the contract the plaintiff undertook to practice law and the statement of claim does not allege that the plaintiff had the right to practice law in the state of Illinois. In support of their contention counsels for the defendant rely on the case of Midland Credit Adjustment Co. v. Donnelley, 319 Ill. App. 271, 275.

We do not think that the contention of counsel for the defendant can be maintained, as the contract in the case at bar expressly provides as follows:

> "Prior to the signing of this agreement it is understood by all concerned and by all that hereinafter may be concerned that Agency [the plaintiff] does not render or purport to render legal services or practice law."

In the case of Midland Credit Adjustment Co. v. Donnelley, supra, in which it appeared that the contract provided for the collection of accounts without suit and with suit, the court said (p. 275):

> "The bill as amended states a case wherein the corporation complainant was engaged with its co-complainant in the practice of law. This clearly appears from their having contracted to make collections with or without legal proceedings."

Counsel for the defendant further contend that the statement of claim is insufficient in that it fails to allege that the plaintiff had performed all the conditions of the contract required to be performed by him, or that he was ready, able and willing to perform them.

We agree with this contention.

Counsel for the plaintiff, however, maintain that the action "was not brought to recover for services which the plaintiff would have to perform as a condition precedent to recover;" that "the cause of action as set out in the statement of claim was for the amount agreed by the defendant to be paid to the plaintiff when claims should be withdrawn by the defendant from the plaintiff's hands after the date of their entry;" that "the statement of claim set up that the claims in question were entered by the defendant to the plaintiff under the contract, and the claims were withdrawn by the defendant after the date of their entry whereby the plaintiff became entitled to the amount claimed;" that "there was nothing in the contract required to be done by the plaintiff as a condition precedent to the recovery of the amount in case of withdrawal of claims after the date of their entry under the contract;" that "the agreement to pay the commissions to the plaintiff on claims withdrawn after date of entry was an independent agreement and upon the withdrawal of the claims the amount became due to the plaintiff."

Assuming for the sake of argument that the contention of counsel for the plaintiff that the clause of the contract in regard to the claims which the defendant might withdraw, is an independent agreement, then it follows that that agreement is unenforceable for want of mutuality. By the terms of that agreement, as construed by counsel for the plaintiff, the defendant is obligated to pay the plaintiff commissions on claims which the defendant might withdraw from the plaintiff, although the plaintiff is under no obligation to perform any services whatever in respect of such claims. The rule is that where one party is bound to pay but the other is not bound to perform, the contract is lacking in mutuality and is therefore unenforceable. 13 Corpus Juris, sec. 193, p. 341.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P.J., and Hatchett, J., concur.

88 - 31216

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. MARY O'TOOLE, Defendant in Error, vs. WILLIAM HARAN, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a writ of error prosecuted by William Haran, the defendant, to reverse a judgment against him in a proceeding in bastardy in the Municipal court of Chicago.

The defendant was tried before the court and a jury; the jury found the defendant guilty; the court ordered the defendant to pay $1100 for the support, maintenance and education of the child; and further the court ordered the defendant to give bond instanter in the sum of $2200, and in default of bond to be committed to the county jail. The defendant failed to give bond and was committed to the county jail.

As the defendant has assigned no error on the evidence it will not be necessary to state or discuss the evidence. It will be sufficient to say that the evidence is conflicting.

The only ground on which the defendant asks for a reversal of the judgment is that the court erred in instructing the jury as follows:

> "There is a rule of law that abides here that if any witness, that is, that if you believe that any witness has testified falsely to any fact material to this issue, then you can disregard all of the testimony of any such witness, except in so far as such witness may have been corroborated by other credible testimony or by facts and circumstances in evidence."

Counsel for the defendant contends that in view of the conflicting evidence the jury should have been accurately instructed, but that in the part of the court's charge to the jury complained of, the essential element of wilfully and knowingly

testifying falsely was omitted.

We think that on the record the defendant is not in a position to assign error on the court's charge to the jury. From the record it is evident that the court instructed the jury orally. In such case the record must show that the defendant objected specifically to the charge. Pecarare v. Malberg, 246 Ill. 95, 96, 97. In the case at bar the defendant did not make the specific objection now urged against the court's charge. At the conclusion of the charge the following colloquy took place between the court and the attorneys:

"The Court: Is there any objection by either side to any instruction given?

Trial Attorney for the Defendant: May I suggest you instruct the jury --

The Court: Just answer that particular question. As to any part of the instructions given, are you stating any objection?

Trial Attorney for the People: No, I am not.

Trial Attorney for the Defendant: I am objecting.

The Court: Are you objecting?

Trial Attorney for the Defendant: I am objecting.

To the giving of each of said instructions the defendant then and there duly excepted.

The Court: Do you desire me to instruct the jury on any point?

Trial Attorney for the Defendant: Yes. On behalf of the defendant I wish you would instruct the jury that the fact that the defendant has testified in his own behalf should be taken as -- be given as fair consideration as any other witness.

Trial Attorney for the People: Both sides should be included in the instruction as given.

The Court: I think I'll do that.

Trial Attorney for the People: It is covered already.

The Court: Yes, it is covered but I will say a little more. In this case, gentlemen, both this complaining witness and the defendant have testified in this case and the fact that one is the complaining witness and the other is the defendant, did not stop them from being competent witnesses here to testify on their respective sides. Having undertaken to testify, they are just witnesses here, and their testimony is to be judged the same as any other witnesses' testimony is judged and weighed. The fact that she is the complaining witness and he is the defendant are facts which you may take into consideration. You have no right to disregard the testimony of either one of them just from the mere fact that one is complaining and the other defendant, and you should treat them just as you do all other witnesses in considering their testimony and determining where the greater weight or preponderance lies and just what the truth of the matter is. Reach your verdict on the evidence here and sign it and return it to me."

testifying falsely was omitted.

Counsel for the defendant contends that specific objections to oral instructions in the Municipal court are required by rule 8 of that court; that that rule does not appear in the record, and that the court cannot take judicial notice of the rule.

We are not deciding the question on the assumption that the defendant failed to comply with rule 8 of the Municipal court. Irrespective of a rule of court, it is a general rule of law that where the court instructs the jury orally, in order that an exception to the charge may be saved for review, a specific objection must be made. Pecarero v. Halberg, supra, (p. 97); Haskins v. Haskins, 67 Ill. 446.

Counsel for the defendant maintains that the oral charge must be taken as a whole and that it would not be proper "to pick out certain portions of the charge, omitting the other portions which limit and qualify the same." In support of his contention counsel cites the cases of Greenberg v. Childs & Company, 242 Ill. 110, 115, and Zeman v. North American Union, 263 Ill. 304, 313.

The contentions of counsel are correct, but a different question is presented on the record in the case at bar. The record shows that no specific objections were made to any parts of the oral charge; that only the following general objection was made: "To the giving of each of said instructions the defendant then and there duly excepted." Such an exception, according to the cases of Pecarero v. Halberg, supra, and Haskins v. Haskins, supra, is insufficient to save the question of the correctness of the oral charge for review.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and Hatchett, J., concur.

107 - 31236

BERTHA B. FORRESTER, Administratrix of the Estate of Joseph Forrester, Deceased, Defendant in Error, vs. CHARLES C. ADSIT, Plaintiff in Error.	ERROR TO SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a writ of error prosecuted by Charles C. Adsit, the defendant, to reverse two decrees in favor of Bertha B. Forrester, administratrix of the estate of Joseph Forrester, deceased, the complainant, in a suit in equity brought by the complainant against the defendant.

Personal service was had upon the defendant, but he failed to enter his appearance in the suit. On February 4, 1926, a decree was entered against him defaulting him for want of an appearance, ordering that the bill be taken pro confesso against him for want of an answer to the bill of complaint, finding facts substantially as alleged in the bill, and referring the cause to a Master to take an accounting.

The only evidence that was adduced before the Master was the testimony of one witness. The Master found that all of the material allegations of the bill of complaint are true; and further found that the defendant owed to the complainant the sum of $13,404.61. On February 10, 1926, the chancellor entered a decree approving and confirming the Master's report. Subsequently the complainant filed a petition alleging that the defendant had "wilfully neglected and refused" to pay the money which the decree directed to be paid, and praying for a rule requiring the defendant to show cause why he should not be punished for contempt. The court entered an order directing the defendant to show cause

117 - 32108

DAVID E. CHAPMAN, Administrator, of the Estate of Jesse Johnson, Deceased, Defendant in Error, vs. Jesse E. Smith, Plaintiff in Error.	Error to District Court of Cass County.

Syl. 1. 1. 1. 1958

WM. Jackson Murphy, Defendant in error, pro se.

This is a suit of error commenced in Cass County. Ohio, the defendant, in proceed the Jackson is first of Cass County, Ohio, Johnson, administrator of the estate of Jesse Johnson, deceased, the complainant, in a suit to quiet title to the real property, against the defendant.

Personal service was had upon the defendant, but he failed to enter his appearance in the case. On February 6, 1958, a decree was entered against the defendant for the full of an accounting, ordering that the title to land be quieted in the plaintiff upon payment of the sum of $1,000 to the clerk of court. Failing from constitutionality on appeal to the 6th, not referring the case to a Justice to take an accounting.

The only question that was raised before the trial court was the sufficiency of the pleadings. The Justice found that all of the material allegations of the bill of complaint are true, and further found that the defendant had no complaint the sum of $1,000.00. On February 11, 1958, the defendant filed a motion requesting the court to vacate the judgment. Subsequently the defendant filed a petition alleging that the defendant had "filing requirements not included" in the money which the trial diverted to be paid, and asking for a rule requiring the defendant to show cause why he should not be punished for contempt.

The court refused to grant the defendant's motion to vacate the judgment.

why he should not be punished for contempt. The hearing on the petition was continued, and was still pending at the time the present writ of error was prosecuted.

The only question to be determined on this writ of error is whether, when every legitimate and reasonable intendment and presumption is indulged in support of the allegations of the bill of complaint, there are sufficient facts alleged in the bill of complaint to justify the decrees.

The bill of complaint is in substance as follows:

"Your oratrix further represents unto your Honors that one Charles C. Adsit of the City of Chicago in the County of Cook and State of Illinois, who is made a party defendant to this bill of complaint, had in his possession on, to-wit, the 26th day of December, A. D. 1919, as a trustee for the said Joseph Forrester a large sum of money, the exact amount of which is unknown to your oratrix, and which your oratrix has been unable to ascertain, but amounting to not less than the sum of Fifteen Thousand Eight Hundred Twenty-six Dollars and forty cents, which amount of money the said defendant, Charles C. Adsit, then and there in writing acknowledged and promised to pay to the said Joseph Forrester; that afterwards on, to-wit, the seventh day of January, A. D. 1921, during the lifetime of the said Joseph Forrester, the said defendant, Charles C. Adsit, caused to be paid on his behalf to the said Joseph Forrester, a portion of said money amounting to the sum of One Thousand Five Hundred Eighty-two Dollars and Sixty-four cents and afterwards, on to-wit, the 17th day of March, A.D. 1921, during the lifetime of the said Joseph Forrester, the said defendant, Charles C. Adsit, caused to be paid on his behalf to the said Joseph Forrester a portion of said money amounting to the sum of One Thousand Five Hundred Eighty-two Dollars and sixty-four cents, and afterwards, on to-wit, the 17th day of July, A. D. 1922, during the lifetime of the said Joseph Forrester, the said defendant, Charles C. Adsit, caused to be paid on his behalf to the said Joseph Forrester a portion of said money amounting to the sum of One Thousand Five Hundred Eighty-two Dollars and sixty-four cents, and afterwards, to-wit, on the 22nd day of December, A. D. 1922, during the lifetime of the said Joseph Forrester the said Charles C. Adsit caused to be paid on his behalf to the said Joseph Forrester a portion of said money amounting to the sum of One Thousand One Hundred Seven Dollars and eighty-two cents, but has never paid, or caused to be paid, either to the said Joseph Forrester in his lifetime, or to your oratrix, the balance of the said money and the interest thereon, or any part thereof; that the money first hereinbefore mentioned was in part money which the said Joseph Forrester in his lifetime had delivered to the said defendant Charles C. Adsit to hold in trust for the said Joseph Forrester and in part the proceeds of sale of certain shares of the capital stock of certain corporations theretofore held in trust by the said defendant, Charles C. Adsit, for the said Joseph Forrester, the exact

number of shares of stock and the names of the companies issuing the same being unknown to your oratrix and your oratrix having been unable to ascertain the same.

"Your oratrix further represents unto your Honors that she is informed and believes, and so charges the fact to be, that during the lifetime of the said Joseph Forrester the said defendant, Charles C. Adsit, assumed to and did deal with the said shares of stock and money of the said Joseph Forrester in the hands of the said Charles C. Adsit and in such dealings did make divers and sundry secret profits which were unknown to the said Joseph Forrester and the particulars of which are unknown to your oratrix, and that it would so appear if the said Charles C. Adsit would render a true and complete accounting of his acts and dealings with the said Joseph Forrester and with the shares of stock and money of the said Joseph Forrester.

"Forasmuch, therefore, as your oratrix is without remedy in the premises except in a court of equity, and to the end that the said Charles C. Adsit, who is hereby made a party defendant to this bill of complaint, may be compelled to answer the same, but not under oath (his answer under oath being hereby expressly waived); that an account may be taken herein by or under the directions of the court; that the said Charles C. Adsit may be required to particularly and specifically set forth and state the amount, nature and description of all the money and shares of stock of the said Joseph Forrester which were ever in the hands of the said defendant, Charles C. Adsit, or by him held in trust for the said Joseph Forrester, giving the dates of all transactions, the person or persons from whom said shares of stock and money were received, what was done with all of the same and with the proceeds and avails thereof and specifically and exactly what authority the said Charles C. Adsit had for so dealing with the same; that your oratrix may have a decree requiring said defendant, Charles C. Adsit, to pay to your oratrix whatever may be found to be due to her upon the taking of such account, together with the costs of this proceeding, by a short day to be fixed by the court; and that your oratrix may have such other and further relief in the premises as equity may require and to your Honors may seem meet."

The pertinent parts of the decree of February 4, 1925, are as follows:

"And the court hereby finds that the court had jurisdiction of the parties and subject matter herein; that the said Joseph Forrester died on the sixteenth day of November, 1925, intestate; that Letters of Administration of his Estate were issued to the said complainant on the twentieth day of November, 1925, by the Probate Court of Cook County, in the State of Illinois; and on the same day the said complainant accepted the said appointment as administratrix and filed her bond as such and ever since has been and is now acting as the duly qualified and acting administratrix of the said estate of Joseph Forrester, deceased; that on or about the twentieth day of December, A. D. 1925, the said defendant had in his possession as Trustee of the said Joseph Forrester, a large sum of money, the exact amount of which was not less than the sum of Fifteen Thousand Eight Hundred Twenty-six Dollars and Forty Cents ($15,826.40), which the said defendant then in writing acknowledged and promised to pay to the said

number of shares of stock and the name of the companies involved, the time being allowed to your readers and your events having been unable to appreciate the case.

"Your article further represents to the public that you have ala informed and believed, and do claim the fact to be, that during the illness of the said Jacob Parmenter the said defendant, Charles G. Adams, managed to get hold with the said shares of stock and money of the said Jacob Parmenter in the hands of the said Charles G. Adams and in such dealings with the said Jacob Parmenter, and also in the performance of which are the proceeds of your article, and also in order to appear in the said charles G. Adams would refer a fine and cause the accompanying affidavits and dealings with the said Jacob Parmenter and with the shares of stock and money of the said Jacob Parmenter.

"Therefore, therefore, we pray your article be without remedy in the proceeds appear in a court of equity, and so the and that the said Charles G. Adams, who is hereby made a party defendant to this bill of complaint, may be compelled to answer the same, but not under such fine shower under such penal hereby strongly waively, that an account may be taken herein by or under the direction of the court; that the said Charles G. Adams may be required to produce and accountably for, from and with the account, matter and description of all the money and shares of stock of the said Jacob Parmenter which were ever in the hands of the said defendant, Charles G. Adams, or by him held in trust for the said Jacob Parmenter, giving the dates of all transactions; the names of persons from whom paid shares of stock and money were received, what was done with all of the same and with the proceeds and whole thereof and particularly and exactly what authority the said Charles G. Adams had for so dealing with the same; that your article may have a decree requiring said defendant, Charles G. Adams, to pay to your orator whatever may be found to be due to her upon the taking of such account, together with the costs of this proceeding, by a short day to be fixed by the court; and that your orator may have such and other and further relief in the premises as equity may entitle and to your honors may seem meet."

The petitioner refers to the issues of February 4, 1893, as follows:

"Our readers will remember that the Jacob Parmenter case, which we reported in our issue of January 28, 1893, involving the ownership of the stock of the Jacob Parmenter Company, disappeared or about the twelfth day of December, G. G. Adams, the said defendant had in his possession or trusted of the said Jacob Parmenter, a large sum of money, the amount of which was not less than the sum of Fifteen Thousand Eight Hundred Dollars and Forty Cents ($15,840.40), which the said defendant failed in writing interpleaded and produced to pay to the said

Joseph Forrester, a portion of which money with interest thereon has never been paid either to the said Joseph Forrester in his lifetime, or to the said complainant; that the money first hereinbefore mentioned was, in part, money which the said Joseph Forrester, in his lifetime, had delivered to the said defendant, to hold in trust for the said Joseph Forrester, and in part the proceeds of sale of certain shares of the capital stock of certain corporations theretofore held in trust by the said defendant for the said Joseph Forrester; that during the lifetime of the said Joseph Forrester, the said defendant assumed to and did deal with the said shares of stock and money of the said Joseph Forrester in the hands of the said defendant and in such dealings did make divers and sundry secret profits which were unknown to the said Joseph Forrester.

"It is therefore hereby ordered, adjudged and decreed that the bill of complaint of said complainant be and the same hereby is referred to Wirt E. Humphrey, one of the Masters in Chancery of this court, to take an account herein of the money so held by the said Defendant in trust for the said Joseph Forrester and of the proceeds of sale of the said shares of capital stock and of the secret profits so made by the said defendant, together with interest thereon, less the amount of the payments made by the said defendant on account of the same, to state the unpaid balance of said money and interest and to report the same to the court, together with the evidence taken on said accounting; that upon the making of the said report of said accounting by the said Master in Chancery and upon the approval thereof by the court, the said defendant, Charles C. Adsit, do forthwith pay to the said complainant the amount of said unpaid balance of principal and interest so found by said report, together with complainant's costs herein; that the said complainant thereupon have execution therefor as upon a judgment at law; and that the complainant have such other remedies for the enforcement of the decree herein, and to enforce the payment of the said money, as pertain to the practice and procedure of Courts of Chancery."

The pertinent parts of the decree of February 10, 1926, are as follows:

"And the court being fully advised in the premises, on consideration thereof, doth find that the said defendant purchased for the said Joseph Forrester, deceased, during his lifetime two hundred and twenty-five (225) shares of the capital stock of Inspiration Consolidated Copper Company, which the said Joseph Forrester fully paid for; that the said defendant collected dividends on said stock to which the said Joseph Forrester was entitled; that the defendant subsequently sold said stock; that in addition thereto the defendant had the sum of Thirty-two Hundred Two Dollars and Sixty-two cents ($3202.62) belonging to the said Joseph Forrester; that there is now due to the said complainant for principal so due from the said defendant to the said Joseph Forrester in his lifetime on account of said money, shares of stock and dividends, together with interest to the Third day of February, A. D. 1926, the total sum of Thirteen Thousand Four Hundred Four Dollars and Sixty-one cents ($13,404.61).

"It is therefore hereby ordered, adjudged and decreed that the said defendant, Charles C. Adsit, do forthwith pay to the said complainant Bertha E. Forrester as Administratrix of the estate of Joseph Forrester, deceased, the said sum of Thirteen

Thousand Four Hundred Four Dollars and Sixty-one cents ($13,404.61) together with the complainant's costs of suit herein; that the said complainant have execution therefor as upon a judgment at law; and that the complainant have such other remedies for the enforcement of the decree herein and to enforce the payment of the said money as pertains to the practice and procedure of courts of chancery."

There is no substantial dispute between counsel for the defendant and counsel for the complainant in regard to the general rules of pleading applicable to the case.

Counsel for the complainant maintain that "in testing the sufficiency of a bill after a decree pro confesso all matters which could have been reached only by special demurrer or motion to make more definite, and many that could be reached by general demurrer are regarded as waived, and the most liberal rule of construction is adopted in favor of the complainant and every intendment is availed of that will make the pleading good." Counsel for the defendant concede the correctness of these contentions, but contend that these rules "are of no practical force unless the allegations are ambiguous or susceptible of two constructions;" that "it is not so much that the bill in the instant case is ambiguous in its allegations, as that it is lacking in essential allegations of facts to establish a trust."

Counsel for the complainant further maintain that "while a decree pro confesso concludes a defendant only as to the facts properly alleged in the bill and not as to mere conclusions of law, yet he is concluded as to the allegations of ultimate facts which may consist, as in the instant case, of conclusions of fact drawn from the evidentiary facts." Counsel for the defendant conceded the familiar rule that the ultimate facts and not evidentiary facts should be pleaded, but maintain that in the case at bar the bill of complaint does not "allege sufficient facts under the well settled rules of pleading to sustain the decrees."

It is an elementary rule that a decree can not be broader than the bill; that a complainant must recover on the case made by his bill or he cannot recover at all. Gregory v. Gregory, 323 Ill. 380, 385.

In regard to a suit in equity brought to establish and enforce a trust, the general rule is that the bill must allege with certainty and distinctness all the facts relied upon to show the creation and existence of the trust. 39 Cyclopedia of Law and Procedure, p. 621. It is also the rule that in a suit against a trustee for a breach of trust the bill must allege facts showing a breach or violation by the trustee of his trust, or that he has declined or refused to carry out the trust according to its terms, or that he has denied the trust. 39 Cyclopedia of Law and Procedure, pp. 623, 634.

In the case of Crear v. Farmers State Bank & Trust Co., 286 Ill. 454, in discussing the sufficiency of the allegations in a bill to establish and enforce a resulting trust, the court said (p.465):

> "The law is clear that where a resulting trust is sought to be established and enforced 'the trust must be clearly alleged in the bill not only in terms, but all the facts must be set out from which the trust is claimed to result;' ** that the pleader should state in his bill the specific facts constituting the substantial groundwork of his case, and not loose or general conclusions from those facts nor mere matter of argument; that the averments should be positive, certain and unambiguous."

In the case at bar, as we construe the allegations of the bill, no facts are averred which show the nature of the trust between the defendant and Joseph Forrester. The terms of the agreement between the defendant and Forrester which created the trust are not averred; and there are no facts alleged which would show the nature of the original transaction between the defendant and Forrester, out of which the trust arose. Whether the agreement creating the trust was written or oral does not appear from the bill. No facts are alleged from which reasonably it can be determined as to how the defendant happened to hold in his possession, as trustee for Forrester, the sum of $15,826.40. In other words, the bill does not allege the

It is an elementary rule that a devise can not be broader than the will; that a constituent may recover on the case made by his will or be wholly barred of all. Hawley v. Hawley, 228 Ill. 390, 392.

To regard be a rule in equity Dewsnap to establish the enforce a trust, the general rule is that our will also signs with certainty and identificate all the Jerry right upon is also the creation and existence of the trust. 39 Cyclopedia of law and Procedure, p. 228. It is also the rule that at a will against a devise for a breach of trust the bill must allege facts showing a breach or violation by the trustee of his trust, or that he has declined or refused to carry out the trust according to its terms, or that he has denied the trust. 39 Cyclopedia of law and Procedure, pp. 228, 229.

In the case of Dewsnap v. Jerry (this time a trust is), 288 Ill. 434, in discussing the sufficiency of the allegations in a bill to establish and enforce a resulting trust, the court said (p. 441):

> "The law is also that where a resulting trust is sought to be established and enforced, the trust must be clearly alleged in the bill and only in trust, but it the facts must be set out from which the trust is claimed to result; or, that the pleader should state in his bill the specific facts constituting the substantial grounds of his case, and not leave or general conclusions from these or more matter of argument, that the evidence must be positive, cogent and unmistakable."

In the case at bar, we consider the allegations of the bill, no facts are averred which show the nature of the trust between the defendant and Jerry Dewsnap. The trust of the agreement between the defendant and Dewsnap which created the trust are not averred; and there are no facts alleged which would show the nature of the alleged transaction between the defendant and Dewsnap, and of which the trust issue. Further the agreement creating the trust the written or oral does not appear from the bill. No facts are alleged from which presumably it can be deduced as to the defendant Dewsnap intended to hold in his possession, as trustee for Dewsnap, the sum of $18,000.00. In other words, the bill does not allege the

facts surrounding the transaction by which the $15,826.40 came into the defendant's possession; nor does the bill allege the terms and conditions on which the defendant held the $15,826.40 as trustee of Forrester. The bill alleges that the defendant acknowledged in writing "which [sic] amount of money" and "promised to pay to [sic] " Forrester. Presumably these allegations are intended to mean that the defendant acknowledged in writing the receipt or possession of the money and promised to pay the money to Forrester. But the written instrument referred to in the bill is not set out in the bill nor attached to the bill as an exhibit. Nor is the substance of the written instrument stated in the bill. It is alleged in the bill that part of the $15,826.40 held in trust by the defendant for Forrester consisted of "the proceeds of sale of certain shares of the capital stock of certain corporations theretofore held in trust" by the defendant for Forrester. No facts are alleged to show who made the sale, nor to show the nature of the trust for which the defendant held the proceeds of the sale. The bill further alleges that the defendant "assumed to and did deal with the said shares of stock and money" of Forrester, "and in such dealings did make divers and sundry secret profits which were unknown to" Forrester, "and the particulars of which are unknown" to the complainant; "and that it would so appear if the" defendant "would render a true and complete accounting of his acts and dealings with" Forrester "and with the shares of stock and money of" Forrester. There are no allegations in the bill, however, which would show the nature of the trust by which the defendant received the money and obtained the shares of stock; and there are no allegations from which it would appear that the defendant was guilty of a breach of trust in dealing with the money and the shares of stock. Furthermore, since the bill does not state the length of time that the trust was to continue, reasonably it cannot be presumed that the defendant has violated his trust or that he is under a legal obligation to render an accounting to the complainant in regard to

Trots motsvarande den ursprungliga av vilken den 224,000.dc come into the defendant's possession, and have the bill stand upon the same conditions on which the defendant held the 224,000.dc on behalf of Dorrestor. The bill alleges that the defendant's endorsement in writing "value [illegible] order or assigns" and "pronounce - pay to [illegible] Dorrestor." Presumably these allegations are intended to mean that the defendant endorsed in writing the receipt or possession of the money and produced to pay the money to Dorrestor. But the written instrument referred to in the bill is not set out in the bill nor is it stated on the bill so as available. Nor is the substance of the written instrument stated in the bill. It is alleged in the bill that part of the 224,000.dc held in trust by the defendant for Dorrestor consists of "the proceeds or sale of certain shares of the capital stock of [illegible] Manufacturers Distributors Ltd. in trust" by the defendant for Dorrestor. The Trustee has failed to show the sale, nor to show the nature of the trust for which the defendant held the proceeds of the sale. The bill further alleges that the defendant "agreed to act jointly with the bill plaintiff and money" of Dorrestor, "and is now [illegible] the same [illegible] [illegible] which were entered by Dorrestor," and the [illegible] of which was without" is the conclusion; "all that it could do was pay it to" defendant "would murder a [illegible] and complete [illegible] of his acts and dealings with" Dorrestor "and will, the shares of stock and money of" Dorrestor. There are no allegations in the bill, however, which show the nature of the trust by which the defendant received the money and shares of the shares of stock; nor are no allegations from which it would appear that the defendant was guilty of a breach of trust in dealing with the money or the shares of stock. Furthermore, since the bill does not state the terms of the trust the trust was to perform, fundamentally it cannot be asserted that the defendant has violated his trust or that he is under a legal obligation to render an accounting in the nature of a trust to Dorrestor.

the trust. Moreover, since the bill does not show that a demand has been made on the defendant for an accounting, fairly it can not be presumed that the complainant has treated the trust as having been terminated.

With the exception of such phrases as "trustee for the said Joseph Forrester, " "to hold in trust for the said Joseph Forrester," "held in trust by the said defendant, Charles C. Adsit, for the said Joseph Forrester," there are no other allegations in the bill that reasonably could be construed as alleging a trust. In our opinion the allegations that we have just quoted are mere conclusions of law and not allegations of ultimate facts. Alexander v. Fidelity Trust Co., 215 Fed., 791, 794; Young v. Mercantile Trust Co., 140 Fed. 61, 62; Metropolitan Trust Co. v. Columbus, Sandusky & Hocking R. R. Co., 93 Fed. 689, 692; Seymour v. Mechanics & Metals National Bank of City of New York, 177 N. Y. S. 493, 495.

In the case of Young v. Mercantile Trust Co., supra, it was alleged that the complainant delivered certain securities to the defendant as trustee and depository, to hold and thereafter distribute as directed and authorized by the complainant; that the defendant received the securities and accepted the trust; that the defendant violated the rights of the complainant and violated its duties as trustee to the complainant. The court said (pp. 61, 62):

> "How the securities were disposed of, whether by sale or distribution, what complainant's wishes or directions were, or in what particular his rights had been violated, does not appear. *** A court of equity doubtless has plenary power to determine the rights and liabilities arising between a trustee and the beneficiaries of a trust. It is evident, however, that the general allegation of trust or trusteeship, together with the object and purpose of its creation, is not here distinctly or sufficiently averred. It is pertinent to inquire, what did the defendant undertake to do other than become depositary or bailee? The character of the trust, its extent or purpose, and whether in writing or by parol, is not disclosed. The essential elements of a trust, viz., a beneficiary. a trustee other than the beneficiary, the subject-matter of the trust relations, and surrender of the property and transfer of the title to the trustee, are not well pleaded."

In the case of Alexander v. Fidelity Trust Co., supra, the court said (p. 794):

> "The averment 'held in trust' is a legal conclusion, not a fact. The fact of whether the trust is an express or constructive trust, and, if the latter, the facts out of which the implication of a trust arises should be stated."

In the case of Metropolitan Trust Co. v. Columbus, Sandusky & Hocking Railroad Co., supra, the court stated (p.692):

> "It is said that the averment that Lehorst was a trustee in holding the legal title is the averment of a legal conclusion. I think that this objection is well taken. The bill is in this aspect an action to declare and enforce a trust, and the facts upon which the alleged trust is asserted, whether by reason of an express declaration or by circumstances, should be set forth."

In the case of Seymour v. Mechanics & Metals National Bank of the City of New York, supra, the following averment was held to be a conclusion of law (p. 495):

> "That the interest of the estate of Thomas Williams, deceased, in the Mechanics' Bank, by the terms of the various agreements of acquisition and consolidation, was received by the Mechanics' Bank of the City of New York, and, through the other predecessors of defendant, by defendant in the capacity of an agent, trustee, or fiduciary."

In the case at bar the decrees are based on the theory that a trust relationship existed between the defendant and Forrester. In our opinion the allegations of the bill of complaint are not sufficient to justify the decrees.

For the reasons that we have stated the decrees of the Chancellor are reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

179 - 31311

AARON KUHN, Appellee, v. YELLOW CAB COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Yellow Cab Company, the defendant, from a judgment on the verdict of a jury in the sum of $200 in an action brought by Aaron Kuhn, the plaintiff, to recover the cost of repairing an automobile, which, the plaintiff alleges, was owned by him and which he alleges was damaged in a collision with an automobile owned by the defendant.

In its affidavit of merits the defendant averred specifically that the plaintiff was not the owner of the automobile.

Since we are of the opinion that the preponderance of the evidence shows that the plaintiff was not the owner of the automobile, it will not be necessary to state or to discuss the evidence in relation to the question of negligence.

At the time of the accident the automobile which is alleged to have been owned by the plaintiff, was driven by a chauffeur named Dwight Bemish; and the occupants of the automobile were Carl Weil, the son-in-law of the plaintiff, and Weil's wife, the daughter of the plaintiff. Weil and his wife had gone to the theatre in the automobile. After their return from the theatre, the chauffeur took the nursemaid to her home in the automobile. When the chauffeur was returning from the home of the nursemaid on his way to the garage the accident occurred. The state

LABOR RULE,
Liability,
Negligence.

V.

VILLAGE OF MONTICELLO,
a corporation,
Appellee.

APPEAL FROM
MORGAN COUNTY COURT OF ILLINOIS.

MR. JUSTICE LEWIS DELIVERED THE OPINION OF THE COURT:

This is an appeal by the Village from judgment, on directed verdict, from a judgment in the recovery of a jury in our sum of $500 in an action brought by Lucas Labor, the plaintiff, to recover the cost of repairing an automobile, which, the plaintiff alleges, was caused by the use which he alleges was improper in a collision with an automobile owned by the defendant.

In his declaration of action the plaintiff avers, specifically that the plaintiff was not the owner of the automobile.

Since we are of the opinion that the preponderance of the evidence shows that the plaintiff was not the owner of the automobile, it will not be necessary to which or to answer the questions in relation to the question of negligence.

In the case of the municipal the plaintiff claim to alleged to have been owned by the plaintiff, was driven by a chauffeur named Phillip Smith and the ownership of the automobile was that fact, the ownership of the plaintiff, the "will's wife, the daughter of the plaintiff. Will was his wife but gave to the license to the automobile. After their return from the theatre, the chauffeur took the automobile to her home in the automobile, then the chauffeur was returning from the home of the defendant on his way to the garage the accident occurred. The suit

license for the automobile was in the name of Weil. The repairs were paid for by Weil. No bill for repairs was ever rendered to the plaintiff. Bemish testified that he was hired by the plaintiff to work for him, and that Weil and his wife were present at the time. Bemish also testified that at the time the plaintiff hired him, the plaintiff gave him "the keys" and told him the automobile was at the Willard Garage.

E. T. Walsh, the driver of the defendant's automobile, testified that after the collision he asked Bemish for the name of the owner of the automobile that Bemish was driving, and that Bemish gave him the name Weil. In his testimony Bemish admitted that he told Walsh that Weil was the owner of the automobile. There is no testimony whatever as to who paid Bemish for his services. The plaintiff did not testify. He was in Germany at the time of the trial.

Counsel for the plaintiff contend that the evidence is sufficient to show that the plaintiff was either the owner of the automobile or was a bailee lawfully in possession of the automobile. We do not think that either contention is correct. As we interpret the evidence, the plaintiff was neither the owner of the automobile nor a bailee lawfully in possession of the automobile.

For the reasons stated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McNurely, P. J., and Matchett, J., concur.

lawyer for the defendants was in the case of Ivil. The reporter only put Ivr by Ivil. In Ivil for reporter was even sympathetic to the plaintiff. Bowdoin Ivr[illegible] also for was known by the plaintiff to work for them, was also Ivil was his very friend at the time. Bowdoin also testified that at the time the plaintiff first saw, the plaintiff gave him "the lawyer" and said the defendants was at the Illinois Bowdoin.

Mr. Ivr[illegible] was friend of the defendant's witnesses, testified that after the publication he asked Ivr the same of the owner of the defendants that testify was friend, and that Bowdoin gave him the name Ivil. In his testimony Bowdoin stated that he said Ivil was the owner of the defendants. There is no Bowdoin testimony at is the said Bowdoin for his service. The plaintiff did not "testify". It was in Bowdoin at the time of the trial.

Because for the plaintiff showed that the defendant is sufficient to show that the plaintiff was place the owner of the defendants or was a Bowdoin testify is ownership of the defendants. He do not title that either defendant is ownership. If he interpreted the evidence, the plaintiff was prove the owner of the defendants and a false testify is ownership of the defendants.

For the reason stated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McCULLY, P. J., and McSURLY, J., concur.

298 - 31430

ROBERT E. HICKS, Appellant, vs. WEIGHTSTILL WOODS, E. J. McCARTHY, HARRY S. ALEXANDER, JOSEPH HAGE and WALTER D. HARRIS, Appellees.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Robert E. Hicks, the plaintiff, from a judgment against him in an action of trespass on the case, brought by him against Weightstill Woods, E. J. McCarthy, Harry S. Alexander, Joseph Hage and Walter D. Harris, the defendants, to recover damages alleged to have been sustained as the result of wrongful acts committed by the defendants in pursuance of an unlawful conspiracy.

The defendant Harris was not served with summons and did not enter his appearance. The case proceeded only as to the other defendants.

To the declaration of the plaintiff, as amended, the defendants filed a general demurrer. The court over-ruled the demurrer, and the defendants filed a plea of the general issue and a special plea. The plaintiff filed a general demurrer to the special plea. The court over-ruled the plaintiff's demurrer to the special plea. The plaintiff elected to stand by the demurrer, and the court entered judgment in favor of the defendants.

The substance of the amended declaration, as stated by counsel for the plaintiff, is as follows:

> "That in December, 1922, and for a long time prior thereto, the Robert E. Hicks Corporation, an Illinois corporation, having a capital stock of $10,000.00, of which $7,450.00 was issued and outstanding, was engaged in the business of publishing a magazine which had a large circulation; that many persons, firms and corporations advertised in said magazine; that said corporation derived great gains and profits from the sale of said magazine and for advertisements published therein; that the principal place of business of said corporation was at South Whitley, Indiana; that said corporation was prosperous and solvent.

"That the charter of said corporation provided for five directors; that the plaintiff owned 611 shares, McCarthy owned 20 shares, Alexander owned 61 shares and Joseph Hagn owned 20 shares of the capital stock, and that all of said stockholders were directors; that plaintiff was the president, Hagn the vice-president and Alexander the treasurer; that plaintiff was the editor of said magazine and manager of the business of the corporation and had exclusive charge of all of its affairs; that his salary for 1921 and 1922 was fixed at the sum of $20,000 per annum.

"That said McCarthy had been the secretary of said corporation; that in March, 1922, he resigned as such secretary and his resignation was accepted and thereupon he ceased to act as such secretary; that said Alexander had been employed by said corporation and had worked under the direction of the plaintiff; that in June, 1922, said Alexander quit his said employment and thereupon ceased to work for said corporation.

"That the term of office of all of the directors and officers expired on the first Tuesday in February, 1922; that no directors or officers were then elected; that they all held over until their successors should be elected and should qualify.

"That during the entire period that defendants McCarthy, Alexander and Hagn were directors or officers of said corporation, they did not take any active part in the management of the affairs of said corporation, but with their consent the plaintiff had exclusive charge thereof and of all persons doing business with said corporation knew that plaintiff had long been its president and general manager and the editor of said magazine, and his connection with said corporation was of great value to said corporation and to himself; that all persons dealing with said corporation transacted their business with plaintiff, and all remittances were made to said corporation at South Whitley, and were deposited in banks there, and all of its business was transacted and all of its books of account relating to its said business were kept at South Whitley; that none of the defendants, except Alexander, at any time had anything to do with the management of said business and none of them was known in connection therewith.

"That in November, 1922, the defendant Harris, through the efforts of said Woods and Alexander, purchased eleven shares of the stock owned by Alexander, not for an investment, but for speculative purposes, and with a view to selling the same to plaintiff at a price in excess of the amount he paid therefor and in excess of its value; that all of the defendants were desirous of selling their stock; that there was no market therefor and they requested plaintiff to purchase the same and he refused to do so; that thereupon defendants McCarthy, Alexander and Hagn employed the defendant Woods, who was a lawyer practicing in Chicago and had been and was then acting as attorney for a person who was plaintiff in certain suits against said corporation, to assist them in making such sale to plaintiff.

"That before he was removed as president of said corporation as hereinafter alleged, the plaintiff as such president called a special meeting of the stockholders to be held on December 30, 1922, for the purpose of electing directors to succeed those whose terms of office had expired and those who had become disqualified.

"That the defendants fraudulently and wickedly conspired and concluded together for the purpose of coercing or inducing the plaintiff, against his will, to purchase said stock so owned by them at a price largely in excess of the actual value

thereof; that in pursuance of such conspiracy said defendants maliciously, wilfully and wrongfully committed the following overt acts:

"(1) They agreed with each other that neither would sell his stock without the consent of the others and that all of it should be deposited with and held by Woods subject to their joint order, and that neither would sell his stock to plaintiff unless plaintiff purchased the stock of the others; that the three defendants who constituted a majority of the board of directors of said corporation would assume control of its affairs and oust plaintiff from the management thereof, notify all employees, creditors, banks and other persons dealing with said corporation of such changes in its management, and otherwise interfere with the affairs of said corporation and vex and harrass plaintiff so that he would thereby be coerced and induced to purchase said stock of the defendants, and that they at once entered upon the performance of said agreement.

"(2) They delivered said stock to said Woods and he retained possession thereof.

"(3) McCarthy assumed the office of secretary and acted as such; the defendants who were directors and officers of said corporation called meetings of the directors and at such meetings they removed plaintiff as president, elected Harris a director, employed Woods as attorney for said corporation, established the office of the corporation at Woods' office, demanded of plaintiff that he surrender to them all the records and books of the corporation, reduced the salary of plaintiff as editor of said magazine to $15000 for 1922, after his services had been rendered, directed that the debtors of said corporation be notified to make payment to them at said new office, that all banks at South Whitley and all employees and other persons who had dealt with said corporation be notified of the said acts of the directors; and in all respects said defendants exercised exclusive control and management of the affairs of said corporation; and that they sent or caused to be sent all the notices above mentioned.

"(4) After they received notice of the special meeting of the stockholders called by the plaintiff as aforesaid, the defendants McCarthy, Alexander, Hagn and Woods with the knowledge and approval of said Harris prepared and filed a bill in the Circuit court of Cook county, in which McCarthy, Alexander, Hagn and the said corporation were complainants; and said Woods acted as their solicitor, and the plaintiff and his proxies were named as defendants; that said bill was verified by the affidavit of Alexander, and therein it was falsely alleged that the plaintiff had, in many respects detailed therein, mismanaged the business of the corporation; had converted its funds to his own use; that he was indebted to it in the sum of $5000; that after his removal as president he had continued to act as such; that the notice of the special meeting of stockholders was without official sanction and could not lawfully be held; that if the meeting should be held the plaintiff would remove and secrete and dissipate the funds of the corporation; that he had removed and secreted the books, records, property and affairs of said corporation; that by reason thereof the property, powers and rights of said corporation were in danger of destruction and irreparable loss would result to complainants and complainants prayed for an injunction, etc.

"(5) The complainants in said bill obtained an injunction as therein prayed, without notice to the defendants therein, restraining the holding of said stockholders meeting, and restraining the plaintiff from interfering with the management of the business of the corporation, etc., and caused it to be served on the defendants named in the bill.

"(6) The defendant Harris, with the knowledge, approval and consent of the other defendants herein, caused to be prepared and filed in said cause an intervening petition against all of the parties to the original bill, wherein it was falsely alleged that the plaintiff had been guilty of mismanagement, dishonesty and corruption, substantially as charged in said original bill, and prayed for the appointment of a receiver and that the affairs of the corporation be wound up and the corporation dissolved.

"(7) The defendant Woods thereupon prepared and filed the answer of McCarthy, Alexander, Hagn and said corporation to said intervening petition, in and by which answer it was admitted that all of the allegations of said petition were true and that a receiver should be appointed for the corporation and its business wound up and the corporation dissolved.

"It is further alleged in said amended declaration that all of said allegations made in said bill and petition were false and that the defendants knew them to be false; that Woods pretended to be acting in the interests of said corporation, whereas in fact he represented only said McCarthy, Alexander and Hagn; that said bill, affidavit, petition and answer were filed and said injunction was procured for the purpose of enabling McCarthy to continue to act as secretary, and McCarthy, Alexander, Hagn and Harris to continue to act as directors and officers of said corporation, so that they might destroy it and impair the investment of the plaintiff in its stock and continue to harass and vex him in the manner aforesaid, and thereby coerce and induce him to purchase the said stock owned by defendant; that the said acts of defendants caused confusion in the affairs of said corporation, its employees were hampered in the discharge of their duties, persons dealing with the corporation were thereby annoyed and said corporation thereby suffered great loss in its business; that said cause was referred to a Master in Chancery and evidence was introduced by the parties.

"It is further alleged in said amended declaration that all of said acts of the defendants were committed in furtherance of said wrongful conspiracy and agreement, that as the result of said acts of the defendants said plaintiff was compelled to and did purchase said stock and paid $7500 for stock of the face value of $1010; that thereupon said defendants ceased further to prosecute said bill and intervening petition and that they were both dismissed for want of equity and the defendants thereupon ceased to annoy and vex the plaintiff.

"That by means of which several premises the plaintiff has been injured and has sustained damages, the business and credit of the corporation was impaired and thereby plaintiff sustained damages as a stockholder and as an officer and employee of said corporation; to the damage of the plaintiff in the sum of $25,000.00."

The special plea of the defendants is as follows:

"And for a further plea in this behalf the defendants, Weightstill Woods, E. J. McCarthy, Harry H. Alexander and Joseph Hagn, say the plaintiff ought not to have his aforesaid action

against them, the said defendants, or any of them, because, they say, that the several supposed causes of action mentioned in said amended declaration were duly released, satisfied and discharged by the decree in said injunction suit, mentioned in said declaration, which decree provided that all and every liability upon the injunction bond given in said injunction suit is released, satisfied and discharged, the pertinent paragraph of said decree being as follows: 'and it is further ordered that the bond approved December 30, 1922, be cancelled and all liabilities thereunder be discharged. Ira Ryner, Judge;' and this the said defendants are ready to verify;

"Wherefore they pray judgment if the plaintiff ought to have his aforesaid action against them, etc."

It is the contention of counsel for the plaintiff that the special plea of the defendants is insufficient in that it "purports to answer the whole declaration, whereas it appears from an inspection of the plea that it attempts to answer only one of the seven overt acts of the defendant conspirators, viz: the filing of the bill, the procuring of the injunction and causing the injunction to be served;" that "all the other wrongful acts of the defendants set forth in the declaration, viz: the wrongful agreement, the delivery of the stock to Woods, the wrongful and illegal acts of the defendants as directors and officers, the filing of the intervening petition and the filing of the answer of the corporation to the petition, remain unanswered."

Counsel for the defendants maintain that the declaration of the plaintiff does not state a cause of action; that "the only act, which under any theory, could be claimed to be a cause of action, was the injunction proceeding;" and that whatever liability that might have resulted from that proceeding was discharged by the order which, as alleged in the special plea, cancelled the injunction bond and discharged "all liabilities thereunder;" that furthermore, in no event can the plaintiff properly contend that the defendants committed seven wrongful acts, since four of the acts alleged by counsel for the plaintiff to be wrongful, namely (a) the filing of the bill in the injunction proceeding, (b) the obtaining of the injunction, (c) the filing of the intervening petition in the injunction

proceeding, (d) the answer to the intervening petition, did not constitute separate acts but were merely parts of one act, namely, the injunction proceeding.

The first question to be determined is the question whether the declaration states a cause of action.

Counsel for the plaintiff contends that the defendants have waived that question by pleading over after their demurrer to the declaration was over-ruled; that in such case the plaintiff's demurrer to the defendants' special plea cannot be carried back to the declaration. In support of his contention counsel cites the following cases: Chicago v. The People, 210 Ill. 84; Fish v. Farwell, 160 Ill. 236; Stearns v. Cone, 109 Ill. 340; Carlson v. The People, 118 Ill. App. 592; The People v. Board of Supervisors, 171 Ill. App.46

The rule stated by counsel for the plaintiff is unquestionably correct. But it is also the rule that if the declaration is so defective as not to support the judgment, the question of the sufficiency of the declaration may be considered, even after a demurrer to the declaration has been over-ruled and the party demurring has pleaded over. The People v. City of Spring Valley, 189 Ill., 169, 178; Culver v. Third National Bank of Chicago, 64 Ill. 532, 532; Schofield v. Settley, 31 Ill. 513, 518; Holmes v. Nelson, 148 Ill. App. 554, 560.

Does the declaration state a cause of action?

Counsel for the plaintiff states explicitly in his brief that the action "is not for libel, nor for malicious prosecution;" that "it is an action on the case to recover damages sustained by the plaintiff as the result of wrongful acts committed by the defendants in pursuance of an unlawful combination or conspiracy."

According to the well settled rule (Eldred v. Ripley, 97 Ill. App. 503, 508) the action could not be maintained by the plaintiff in his own behalf against the defendants, on the ground

proceeding, (d) the manner in the informing position, did not constitute compulsion such that were entirely words of one not, simply, the information proceeding.

The final question to be determined is the question whether the declaration which is alone of action.

Counsel for the claimant contends that the interrogatories were without question by alleging even after their discovery in the declaration are over-ruled; that in such case the plaintiff's character in the defendants' minds cannot be restored back to the declaration. In support of his contention counsel cites the following cases: Wilson v. The Times, 1 Ex. 11, 20; Ilott v. Wilkes, 3 B. & Ald. 304; Hearne v. Jones, 2 Ex. 232; Bulkley v. The Times, 1 B. & Ad. 273; The Pamela v. Lord of Chancellors, 17 Ch. 20.

The rule stated by counsel for the claimant is unquestionably correct. But it is also the rule that if the declaration is defective or not in proper form, the question of its sufficiency of the declaration can be considered, even after a demurrer to the declaration has been overruled and the party demurring has pleaded ---. The Pamela v. Lord of Chancellors, 1 Ch 111., 120. 1 Ch; Hearne v. Times Publicat Pub. of Chancery, 4 Ex. 1, 20, 1849; Chapman v. Jones, 6 Ex. 111. 1851, Bulkley v. Jones, 1 B. & Ad. 1831, 1831.

Does the publication place a cause of action?

Counsel for the plaintiff claims exclusively in his brief that the phrase "he was for Abbot, nor for publicans prosecutions" that "it is an action on the case to recover damages sustained by the plaintiff as the result of wrongful acts committed by the defendants in murdering of an unlawful association or conspiracy."

Referring to the well settled rule (Flint v. Pike, 4 Ex. Ann. 411, 300) the action could not be maintained by the plaintiff in his own behalf against the defendants, on the ground

that the acts of the defendant have injured the corporation, unless the directors of the corporation had refused to bring an action. And there is no allegation in the declaration of any such refusal by the directors.

The rule is well established that at common law in a civil action of conspiracy, the conspiracy of itself does not constitute a cause of action; that unless the conspirators commit acts which result in damage, no civil action will lie; that the gist of the cause of action is the damage and not the conspiracy. Doremus v. Hennessy, 176 Ill. 608, 614; Lasher v. Littell, 202 Ill. 551, 554; Duffy v. Frankenberg, 144 Ill. App. 103, 107; Martin v. Leslie, 93 Ill. App. 44, 45.

The precise question then to be decided is whether the declaration alleges that in pursuance of a conspiracy the defendants committed any wrongful act which resulted in damage to the plaintiff.

The object of the conspiracy as alleged in the declaration was to coerce or induce the plaintiff against his will to purchase the stock of the defendants "at a price largely in excess of the actual value thereof." The declaration alleges that the plaintiff was compelled to purchase the stock, but the declaration does not aver that the price that the plaintiff paid for the stock was largely in excess of the actual value of the stock, or that it was in excess of the actual value of the stock, or that it was not the actual value of the stock. The object of the conspiracy, therefore, was not accomplished.

The first specific acts of the defendants which counsel for the plaintiff contends were wrongful acts committed in pursuance of the conspiracy are the acts alleged in paragraph (1) of the summary of the declaration made by counsel for the plaintiff, and set out above in our opinion. The gist of the paragraph is that the defendants agreed with each other to sell their stock to the plaintiff

that the acts of the defendant have injured the corporation, unless the directors of the corporation had refused to bring an action. But there is no allegation in the declaration of any such refusal by the directors.

The rule is well established that an action lies in a civil action of nuisance, the rendering of itself from not constitute a cause of action; that where the municipality could take which result in damage, as civil action will lie; that the plaintiff the cause of action in the damage and not, the municipality. Thomas v. Chadwick, 149 Ill. 600, 616; Lawson v. Price, 167 Ill. 471, 474; Wolff v. Brewington, 161 Ill. 486, 4 L. 637; Dwelle v. Jones, 83 Ill. App. 84, 87.

The proper remedies case is to decline to review the declaration allegee that in reference of a conspiracy the defendants committed any wrongful act which resulted in damage to the plaintiff.

The object of the conspiracy as alleged in the declaration was to secure or induce the plaintiff against his will to pay, cause the stock of the corporation "at a price largely in excess of the actual value thereof." The declaration alleges that the plaintiff was compelled to purchase the stock, but the declaration does not set-out the price that the plaintiff paid for the stock nor largely in excess of the actual value of the stock, or that it was in excess of the actual value of the stock, or that it was not the actual value of the stock. The action of the conspiracy, therefore, was not actionable.

The three counts each of the declarations which connect for the plaintiff contain even wrongful acts committed in pursuance of the conspiracy are the acts alleged to constitute (1) of the conspiracy of the defendants made by counsel for the plaintiff, and set out above in our opinion. The gist of the complaint is that the defendants agreed with each other to sell their stock to the plaintiff

only as a unit. It is not alleged, however, that the defendants agreed with each other to sell their stock to the plaintiff at a price in excess of its value, nor is it alleged that the defendants agreed with each other that they would sell their stock only to the plaintiff and not to any one else. The mere agreement on the part of the defendants to sell their stock as a unit was not unlawful. In our opinion the acts alleged in paragraph (1) do not constitute an actionable wrong against the plaintiff.

The delivery of the stock to Woods, as alleged in paragraph (2), did not, in our view, amount to an actionable wrong against the plaintiff.

The assumption of the office of secretary by McCarthy after he resigned, as alleged in paragraph (3), does not constitute an actionable wrong against the plaintiff, in our opinion. The declaration does not allege that a successor to McCarthy was ever appointed. He was not therefore usurping the place of a lawfully elected secretary. Furthermore, the acts of the directors, as alleged in paragraph (3), are not alleged to have been unlawful or unjustified. There are no averments that the directors meetings were not lawfully held; nor that the directors unlawfully exercised exclusive control and management of the affairs of the corporation.

It is contended by counsel for the plaintiff that while an act done by an individual may not be unlawful, yet the same act when committed by a combination of individuals may constitute an actionable wrong. It is true that there may be cases in which the facts would justify the application of such a rule. Kemp v. Division No. 241, 255 Ill. 213, 223; Franklin Union v. The People, 220 Ill. 355, 376, 377. We do not think, however, that the acts alleged in the declaration in the case at bar are such that, although not wrongful when done by an individual, they become actionable wrongs because of being done by a combination of individuals.

only as a whole. It is not alleged, however, that the referendum agreed with each other in all their views on the principal issue in course of its issue; nor is it argued that the majority made agreed with each other that they would only vote for the standard if one act in any one state. The same agreement on the part of the defendants is not their mind as a whole one act unlawful. In our opinion the sole object in paragraph (1) is not an attempt on unlawfully among members the plaintiff.

The delivery of the shoes to Tonks, as alleged in paragraph (2), did not, in our view, amount to an unlawful agreement via plaintiff.

The evaluation of the effect of contracts by industry after be realized, as alleged in paragraph (4), does not constitute an unlawful among members the plaintiff. In our opinion. The declaration does not allege that a monopoly in industry was created. In one not therefore averring the close of a lawfully closed contract. Furthermore, the code of the plaintiff, as alleged in paragraph (3), are not alleged to have been unlawful or unjustified. There are no necessary that the defendants activities were not lawfully held; nor that the defendants unlawfully exercised control and management of the affairs of the organization.

It is contended by counsel for the plaintiff that while an act done by an individual may not be unlawful, yet the same act when committed by a combination of individuals may constitute an actionable wrong. It is true that there may be cases in which the facts would justify the conclusion of such a tort. Keen v. Bishop 24 Ky. 1329, 1331, 1332; Pennsylvania Union v. The Pennsylvania, 1 Pa. 111, 122, 124, 127. We do not think, however, that the acts alleged in the declaration in the case at bar are such that, although not wrongful when done by an individual, they become actionable wrongs because of being done by a combination of individuals.

The allegations in paragraphs (4), (5), (6) and (7) in our opinion properly should not be considered as separate, independent acts, as counsel for the plaintiff contends. In our view, these acts all relate to the injunction suit and, in effect, constitute one act. Whether these acts constitute an actionable wrong, it is not necessary to decide, as in our opinion, assuming for the sake of argument that they were unlawful, the special plea of the defendants is a sufficient defense.

Counsel for the plaintiff contends that it is not alleged in the special plea, except inferentially, that any bond was given on obtaining the injunction. We do not think the contention is correct. In our view it appears directly from the recital of the part of the decree, quoted in the special plea, that a bond was given in the injunction proceeding.

Counsel for the plaintiff further contends that the averment in the special plea that the cause of action was released, satisfied and discharged by the decree in the injunction proceeding, is a conclusion of law. We do not think that this contention is correct. The special plea specifically quotes the decree as ordering that all liabilities under the bond be discharged.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

McDurely, P. J., and Hatchett, J., concur.

The allegations in paragraphs (4), (5), (6) and (7) in our opinion properly should not be considered as reasons, independent ends, as against the plaintiff contract. In our view, these are all points in the instruction suit and, in effect, constitute one set. Whether these are constitute an estimation view, it is not necessary to decide, as in our opinion, assuming for the sake of argument that they were material, the special plea of the defendant is a sufficient defence.

Counsel for the plaintiff contends that it is not material in the special plea, except incidentally, that any bond was given on obtaining the injunction. We do not think the contention is correct. In our view it matters directly from the terms of the part of the issues, quoted in the special plea, that a bond was given in the injunction proceeding.

Counsel for the plaintiff further contends that the averment in the special plea that the costs of action was returned, satisfied and discharged by the defendant in the injunction proceeding, is a conclusion of law. We do not think that this contention is correct. The special plea specifically quotes the learned as ordering that all liabilities under the bond be discharged.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

Doherty, C. J., and Stewart, J., concur.

320 - 31452

WILLIAM D. MURDOCK, Appellant,	APPEAL FROM
v.	CIRCUIT COURT,
BELLE DIMSDALE et al., Appellees.	COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by William D. Murdock, the plaintiff, from an order dismissing an action brought by him on a promissory note of the defendants on which a judgment by confession was entered, and subsequently vacated.

On motion of the defendants the judgment was vacated. The plaintiff declined to proceed further in the cause and the court dismissed the action.

No bill of exceptions has been filed in the cause. In the record proper an affidavit of the defendants in support of their motion to vacate the judgment is set out, and also two counter affidavits of the plaintiff in opposition to the motion. None of these affidavits however, can be considered as they are not properly preserved for review. They could be made part of the record only by being embodied in a bill of exceptions. Thompson v. Chicago City Ry. Co., 205 Ill. App. 471, 472; Tindall v. Chicago & Northwestern Ry. Co., 200 Ill. App. 557, 560, 561.

Furthermore the counter affidavits of the plaintiff, which controverted the defense of the defendants, properly could not be considered on the defendants' motion to vacate the

[illegible] - [illegible]

[illegible] v. [illegible],
(plaintiff), [illegible] STATEMENT

v.

[illegible] et al.,
(defendants). [illegible] COUNTY.

MR. JUSTICE [illegible] delivered the opinion of the court.

This is an appeal by [illegible], the defendant, from an order dismissing an action brought by him on a promissory note of the defendants on which a judgment by confession was entered, and consequently vacated.

On motion of the defendants the judgment was vacated. The plaintiff desired to present further in the cause and the court dismissed the action.

No bill of exceptions has been filed in the cause. In the trial judge on affidavit of the defendants in support of their motion to vacate the judgment is set out, and also the counter affidavit of the plaintiff in opposition to the motion. Some of these affidavits however, can be considered as they are not properly preserved for review. They could be made part of the record only by being embodied in a bill of exceptions. Thompson v. Chicago City Ry. Co., 200 Ill. 1pp. 472, 472; Tindall v. Palmer & Torrey-Hayden Co., 208 Ill. 1pp. 587, 588, 593.

Furthermore the counter affidavits of the plaintiff, which controverted the defense of the defendants, properly could not be considered on the defendants' motion to vacate the

judgment. Gilchrist Transportation Co. v. Northern Grain Co., 204 Ill. 510, 513; Kloepher v. Osborn, 177 Ill. App. 384, 393.

In the absence of a bill of exceptions the question whether the court erred in vacating the judgment cannot be reviewed.

We do not think that the court erred in dismissing the action after the plaintiff declined to proceed. Brown v. Atwood, 200 Ill. App. 210, 215.

For the reasons stated the judgment is affirmed.

AFFIRMED.

McCurely, P. J., and Matchett, J., concur.

judgment. United Transportation Co. v. United States Co., 222 U.S. 533, 539; Dayton v. Quigley, 255 U.S. 436, 442.

In the absence of a bill of similitude the question whether the state erred in vacating the judgment cannot be reviewed.

We do not think that the court erred in dismissing the motion after the plaintiff rested in chief. Brown v. Spong, 308 U.S. 66, 70, 71.

For the reasons stated the judgment is affirmed.

It is so ordered.

Murphy, J., and Douglas, J., dissent.

372 - 31504

TYTUS KOCHANSKI, Appellee, vs. TONY PLANTZ and ANNA PLANTZ, Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

244 I.A. 627 3

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Tony Plantz and Anna Plantz, the defendants, from a judgment of $200 against them in an action brought by Tytus Kochanski, the plaintiff, to recover damages from the defendants for an alleged refusal of the defendants to perform their part of a written contract for the purchase of property from the plaintiff.

The substance of the affidavit of merits of the defendants is that they were induced to execute the contract through the fraud of the plaintiff; that the title to the property was not examined by their attorney; that a date was not set to close the deal; that as soon as they became aware of the fraudulent acts of the plaintiff they rescinded the contract and notified the plaintiff of the rescision; that the plaintiff has sustained no damages by reason of the alleged failure of the defendants to carry out the contract.

Three witnesses testified on behalf of the plaintiff. The defendants introduced no evidence to support the allegations of their affidavit of merits.

The substance of the evidence is that Anthony Mytys acted as a real estate broker for the plaintiff, and that the plaintiff paid him $200 as a commission for procuring the defendants as purchasers; that the plaintiff and the defendants met in the office of Mytys and entered into a written contract, in which

the defendants agreed to purchase certain property from the plaintiff; that the contract recites that the defendants had paid $300 as earnest money; that a day was fixed on which to close the deal; that the plaintiff employed an attorney who had the abstract of the property brought down to date and who examined the title to the property at the request of the defendant Tony Plantz; that in the opinion of the attorney the title was good with the exception of a judgment against a party of the same name as the plaintiff; that as to this objection, the attorney stated that it could be obviated by an affidavit by the plaintiff; that the plaintiff and the defendants met in the office of the attorney to consummate the sale of the property; that the defendant Tony Plantz left the office, stating that he was going out to get "the money" from "some man;" that he did not return; that subsequently when he was asked what he intended to do about the deal, he stated that he did not care to go through with it.

It is contended by counsel for the defendants that the plaintiff's statement of claim does not allege that a deed was ready for delivery, nor that the plaintiff was ready, able and willing to perform his part of the contract; and counsel further contends that the evidence does not show that any tender of performance was made by the plaintiff, nor that the plaintiff was ready, able and willing to make a conveyance.

In our opinion, none of these contentions is sound. The statement of claim alleges in effect that the defendants repudiated their contract and thereby rendered performance of the contract by the plaintiff impossible. These allegations are sufficient. 13 Corpus Juris, paragraph 849, p. 727. The evidence shows that the plaintiff was ready, able and willing to perform his part of the contract, but that the defendants refused to carry out their part of the contract.

Counsel for the defendants further contends that the names of the plaintiff and his wife appear in the body of the contract, but that the contract is signed only by the plaintiff; that the contract provides that the plaintiff and his wife agreed to convey a good title to the property; that unless the deed to the property was executed by the wife of the plaintiff, it would be ineffectual to convey the inchoate right of dower of the plaintiff's wife; that since the plaintiff's wife did not sign the contract, the plaintiff would be unable to convey a complete title to the defendants

The contention of counsel for the defendants presupposes that because the wife of the plaintiff did not sign the contract, she would not sign the deed of conveyance of the property, and that, therefore, the plaintiff could not convey a good title. We do not think that the contention is sound. On the present record the contract was unquestionably binding on the plaintiff, even though his wife did not sign it. Breiling v. Hybl, 167 Ill. App. 163,167,168.

And we are of the opinion that, assuming for the sake of argument that by the terms of the contract the plaintiff was obligated to give the defendants a deed signed by his wife, it may be presumed from the evidence that he would have been able to do so. The evidence shows that the wife was present at all of the meetings of the parties, including the meeting on the day when the deal was to be consummated. The only reasonable inferences, therefore, are that she was ready and willing on her part to do whatever was necessary to give the defendants a good title; and that the purpose of her being present on the day the deal was to be consummated was to sign the deed of conveyance of the property jointly with her husband.

For the reasons stated the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

Demand for the defendants further contention that the name of the plaintiff and his wife appear in the body of the conveyance, but that the contract is signed only by the plaintiff; that the contract provides that the plaintiff and his wife agreed to convey a good title to the property; that unless the deed to the property was executed by the wife of the plaintiff, it would be impossible to convey the homestead right of dower of the plaintiff's wife; that since the plaintiff's wife did not sign the contract, the plaintiff would be unable to convey a complete title to the homestead.

The construction of contracts for the sale of lands presupposes that because the wife of the plaintiff did not sign the contract, she would not sign the deed of conveyance of his property, and therefore, the plaintiff could not convey a good title. We do not think that the contrary is true. In the present instance the contract was necessarily binding on the plaintiff, even though his wife did not sign it. Spalding v. Ford, 147 Ill. App. 327,329.

And we are of the opinion that, considering the rule of evidence that by the terms of the contract the plaintiff was obligated to give the defendants a good deed signed by his wife, it may be presumed from the evidence that he would have had his wife to do so. The evidence tends to show that the wife was present at all of the meetings of the parties, including the meeting on the day when the deal was to be consummated. The only reasonable inference, therefore, are that she was ready and willing on her part to do whatever was necessary to give the defendants a good title; and that the persons of her husband present in the city the deal was to be consummated was to give the deed of conveyance of the property jointly with her husband.

For the reasons stated the judgment is affirmed.

AFFIRMED.

Fathergill, P. J., and Woolfolk, J., concur.

2 - 30335

HERBERT M. SEARS et al.,
Executors,
Defendants in Error,

vs.

CITY OF CHICAGO, a Municipal
Corporation,
Plaintiff in Error.

ERROR TO CIRCUIT COURT OF
COOK COUNTY.

244 I.A. 627[4]

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The City of Chicago sued out this writ of error to review a decree entered upon a bill for an accounting.

The decree recites that the cause was heard upon the bill of complaint and the answer of the defendant, City of Chicago, as amended, upon replication to said answer, "and upon the proofs, oral, documentary and written, taken and filed in said cause."

The decree finds that on April 22, 1912, the defendant by its council passed a certain ordinance vacating certain streets and alleys in certain property therein described, and that said ordinance provided:

> "Vacation herein provided for is made upon the express condition that Francis Bartlett shall within sixty days after the passage of this Ordinance pay to the City of Chicago the sum of $40,563.08 toward a fund for the payment and satisfaction of any and all claims for damages which may arise from the vacation of said streets and alleys."

It further finds that Bartlett made the payment of said sum pursuant to the ordinance; that the defendant accepted the same and agreed to hold it as a deposit to indemnify itself, as provided in the ordinance; that the five years within which suits for damages resulting from the closing of the streets and alleys could be brought against the defendant had expired, and that the defendant is no longer in fear of any such proceedings and no longer liable for any claims, nor subject to court proceedings filed prior to May 15, 1917; that the complainants and defendant have waived a refer-

ence of the cause to a master in chancery to take an account and discovery of the moneys expended or for which the defendant became liable on account of claims for damages arising from the vacation of said streets and alleys; that the defendant having presented in open court a statement of the moneys so expended, which statement was admitted by the complainants to be a true and correct statement, and it appearing to the court that defendant did expend in satisfaction of claims for damages the sum of $7188.25, and that no other claims for damages were pending or had been made against the defendant, the said defendant City of Chicago was entitled to a credit against said $40,563.08 of said sum of $7188.25, leaving a balance due to the complainant executors of the will of Francis Bartlett of the sum of $33,374.83, which sum it was adjudged defendant should pay to the complainants within five days with lawful interest from that date.

The right of the complainants to recover in a suit at law upon a state of facts such as the decree finds, seems to have been definitely established by the Supreme court in the case of Lockwood & Strickland v. Chicago, 279 Ill. 445, and that decision has been followed in the subsequent cases of John M. Smythe Co. v. Chicago, 294 Ill. 136, and Curt Teich v. Chicago, 308 Ill. 498. This seems to be conceded by the defendant City, which, however, contends that a bill in equity will not lie upon the state of facts disclosed by the record.

It is urged in the first place in opposition to the right of the complainants to recover that the executors came into court with unclean hands, and for two reasons: 1st, because the bill set up an alleged understanding and contract, which did not exist, thereby deceiving the court; and, 2nd, because the complainants are seeking to take advantage of an illegal act of their intestate, thereby profiting by their own wrong doing.

case of the cause to a matter in chancery to take an account and discovery of the money expended or for which the defendant became liable on account of claims for damages resulting from the violation of said statute and alleges; that the defendant having presented an open court a statement of the amount to expended, which statement was admitted by the complainants to be true and correct statement, and it appearing to the court that defendant did expend in satisfaction of claims for damages the sum of $7136.59, and that no other claims for damages were pending or had been made against the defendant, the said defendant City of Chicago was entitled to a credit against said $40,283.00 of said sum of $7136.59, leaving a balance due to the complainant association of the will of Dennis Murphy of the sum of $33,274.59, which sum it was adjudged the defendant should pay to the complainants within five days with lawful interest from that date.

The right of the complainants to recover in a suit at law upon a state of facts such as the Supreme Court in Chicago has been definitely established by the Supreme court in the case of Lockwood v. Prudential v. Chicago. 237 Ill. 458, and that decision has been followed in the subsequent cases of Cook v. Burton Co. v. Chicago. 244 Ill. 116, and Cary Lumber v. Chicago. 244 Ill. 488.

This seems to be conceded by the defendant City, which, however, contends that a bill in equity will not lie upon the state of facts disclosed by the record.

It is urged in the first place in opposition to the right of the complainants to recover that the statutes cede jurisdiction of such matters to the municipal court. Let, because the bill set up an illegal warranting and contract, which did not exist, thereby deceiving the court, and, because the complainants are seeking to take advantage of an illegal act of their institute, thereby profiting by their own wrong doing.

It is a sufficient reply to the first reason stated that there is no proof in the record that the contract set up in the bill was not in fact made, or that the court was deceived by the complainants.

The defendant says that the ordinance providing for the vacation of the streets and alleys in question was in fact the result of a bargain and sale; that complainants' testator paid for the land vacated at the rate of the assessor's average valuation for the property listed on the records of the Board of Assessors and Board of Review. It further says that while it is true that the ordinance recited that the streets and alleys vacated were no longer required for public use, and that the public interest would be best served by their vacation, this recital on its face is contrary to reason and a mere attempt to evade the law with respect to vacations, and it is urged that the court should take judicial notice of the fact that the vacation of territory of more than a half mile square cannot be for the public good.

We are not aware of any case where it has been so held, nor of any principle upon which a court could take judicial notice of any such a situation. The defendant cites People ex rel. Burton v. Corn Refining Co., 286 Ill. 226, to the proposition that the recital in the ordinance is not binding on the court; but that case does not sustain this contention. It was there held that a recital in an ordinance for vacating a street or permitting the erection of an obstruction in it to the effect that it was passed for the benefit of the city was not conclusive upon the courts. The court there held under the facts which were made to appear that the city council did not have the power to pass the ordinance which was then under consideration. It is not argued here that the city council was without power to pass the ordinance upon which the suit of complainants is based; and if it had such power, it is, as the Supreme

were of law. It is a sufficient reply to the first reason stated that there is no proof in the record that the contract was in the still was not in fact valid, or that the water was furnished by the municipality.

The defendant also has the erroneous position, by the vacation of the circuit and always the question was in fact the result of a bungle and only that municipalities' contracts with the land monopoly at the mercy of the monopoly's average valuation for the property listed on the assessor of the board of assessors and board of review. It matters not which it is true that the conditions resulted that the towns and villages vacated were so largely required for public use, and that the public interest could be best served by their vacation, this result on the face is unfortunate in reason and a sure attempt to evade the law with respect to vacations, and it is argued that the court should take judicial notice of the fact that the vacation of boulevard of more than a half mile square cannot be for the public use.

We are not aware of any case where it has been so held, nor of any principle upon which a court could take judicial notice of such a situation. The defendant cites Trustees of Ver- Turner v. Sure Reliance Co., 288 Ill. 388, in the proposition that the trial in the principle is not binding on the court; but that case does not preclude this conclusion. If one there held that a tre- ated in an ordinance for vacating a street or prohibiting the erec- tion of an obstruction in it is the effect that it was passed for the benefit of the city was not judicially upon the trial. The court there held under the facts that made it manifest that the city council did not have the power to pass the ordinance which was then under consideration. It is not argued here that the city council was without power to pass the ordinance upon which the well of pre- ministrate is based; and if it had such power, it is, as the decision

court said in Gurt Teich v. Chicago, supra, estopped both in law and equity to now assert the contrary.

As to the further contention of defendant that the complainants are seeking to take advantage of an illegal act of their intestate, and thus profit by their own wrong doing, defendant, in support of this, argues that on account of the size of the tract of land in which the streets and alleys were opened by this ordinance (it being more than a half mile square), the same was unlawful because done for the benefit of a private party and against the public interest.

If the ordinance, upon its face, disclosed that the intention of the council in passing it was solely to confer rights and privileges upon private persons, then the ordinance would be illegal because, as already stated, not within the power of the council to pass. (See People v. Atkins, 295 Ill. 165.)

There is, however, nothing in this record which would justify such a finding, and the ordinance upon its face appears to be one which the council had a right to pass and which, under the facts which appear in the record, it will be presumed was passed in the public interest.

It is next contended that the decree is erroneous because, as it is said, the complainants having come into equity are bound to do equity; and it is said that this principle demands that there be a restoration of the vacated streets and alleys before there can be a recovery by the complainants.

The answer of the defendant, as amended, relied upon a statute passed by the legislature in 1921 and in force July 1st of that year, which in substance provided that suits, such as complainants', could not be maintained without such restoration of the vacated streets and alleys. That statute was not, however, applicable to this ordinance, and it was repealed by the legislature in

court said in State v. Gilmore, supra, relevant only to law and equity in our courts the contrary.

As to the larger conclusion of defendants that the complainants are seeking in this attempt to illegally use at least intrastate, and thus profits by their own wrong doing, interest, in support of this, argues that on account of the size of the land in which the attempt not alone was caused by this ordinance but being only then a half size market, the same was enacted because the benefit of a private party and against the public interest.

If the argument, upon its face, disregards that the interests of the council in passing it was solely to confer rights and privileges upon private persons, then the ordinance would be illegal grounds, on clearly stated, but within the power of the council to pass. (See Pueblo v. Zeigler, 88 Ill. 268.)

There is, however, nothing in this record which would justify such a finding, but the ordinance upon its face appears to be one which the council has a right to pass and which, under the facts which appear in the record, is still an exercise of the police power.

It is even conceded that the degree in economic power, as it is said, the complainants begins come into equity are bound to do equity; and it is not that this principle demands that there be a consideration of the varied interests and rights before there can be a recovery by the complainants.

The matter of the defendant, as counsel, relied upon a statute passed by the Legislature in 1911 and in force July 1st of that year, which in substance provides that cities, towns or villages, shall not be maintained without some restriction of the vested rights and rights. That matter was not, however, applicable to this ordinance, and it was repealed by the Legislature in

1923.

Moreover, the equitable maxim which the defendant invokes is not applicable to the record here presented, since it has not been made to appear that the vacation of the streets and alleys in question was made for the benefit of complainants' testator. The statute of 1921 could not have been intended to apply to ordinances passed and deposits made prior to its enactment.

It is also urged that the suit was prematurely brought, and Section 21 of the Statute of Limitations is relied on in this respect. The finding of the decree, however, on this point was sufficient.

No reason having been made to appear which would require a reversal, the decree is affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

36 - 31146

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

DAN PETRIZZO,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The facts which appear in this case are similar to the facts which appear in the case of The People of the State of Illinois, defendant in error, v. Dan Gentile, plaintiff in error, Gen. No. 31148, in which an opinion has been this day filed. The record in that case is similar to the record here. For the reasons there stated, the judgment in this case is affirmed.

AFFIRMED.

McCurely, P. J., and Johnston, J., concur.

36 - 31147

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

MIKE BRONCOMANO,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The facts which appear in this case are similar to the facts which appear in the case of The People of the State of Illinois, defendant in error, v. Dan Gentle, plaintiff in error, Gen. No. 31148, in which an opinion has been this day filed. The record in that case is similar to the record here. For the reasons there stated, the judgment in this case is affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

36 - 31148

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

DAN GENTILE,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff in error was the defendant in the trial court on a charge of violating section 3 of the Prohibition Law, (see Smith-Hurd Ill. Revised Statutes, 1925, sec. 3, p. 1095.)

Although duly warned, he waived trial by jury, and upon trial by the court was found guilty in manner and form as charged, and the court, overruling motions for a new trial and in arrest, imposed a fine of $200 and costs, which judgment the defendant seeks to reverse.

A similar information was filed against Mike Scongomano and another of the same kind against Dan Petrizzo, each of whom also (waiving trial by jury) was found guilty and a like judgment imposed. The transaction which resulted in the filing of these informations was one in which these three defendants participated. The records are similar, and the causes have been consolidated in this court. The rules of law applicable to each case are substantially the same.

The language of the information in each case was that the defendant "on the 12th day of January, A. D. 1926, at the City of Chicago, aforesaid, did then and there unlawfully possess, sell, transport, deliver, furnish certain intoxicating liquors containing more than one-half of one per cent alcohol by volume, which was then and there fit for use for beverage

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in Error,

v.

SAM SHOTLA,
Plaintiff in Error,

MR. JUSTICE MORGAN delivered the opinion of the court:

The plaintiff in error was indicted in the criminal court of a violation of section 3 of the Prohibition Law, (see Hallett-Smith Ill. Revised Statutes, 1919, sec. 3, p. 1008.) Although duly warned, he waived trial by jury, and upon trial by the court was found guilty in manner and form as charged, and the court, overruling motions for a new trial and in arrest, imposed a fine of $100 and costs, which judgment the defendant seeks to reverse.

A slight intermission was filed against the sufficiency and another of the same kind against his pleadings, each of which also (waiving trial by jury) was found guilty and a like judgment imposed. The transcription which remained in the filing of these informations was one in which these three defendants participated. The records are similar, and the causes have been consolidated in this court. The rules of law applicable to each case are substantially the same.

The language of the information in each case was that the defendant "on the 20th day of January, A. D. 1920, at the City of Chicago, aforesaid, did then and there unlawfully possess, transport, deliver, furnish and otherwise dispose of, intoxicating liquors containing more than one-half of one per cent alcohol by volume, which was then and there fit for use for beverage

purposes. Said intoxicating liquor then and there in the possession of the said * * * not being possessed in his private dwelling while the same was kept and used by him as a private dwelling only. The said intoxicating liquor not then and there being in his possession by virtue of any permit issued by the attorney general or the office of the Commissioner of Prohibition of the State of Illinois. Said intoxicating liquor not then and there being used for sacramental, medicinal, scientific, mechanical, chemical or manufacturing purposes, not otherwise legally authorized."

Said section 3 is as follows:

> "No person shall on or after the date when this Act goes into effect, manufacture, sell, barter, transport, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. Liquor for non-beverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, delivered, furnished and possessed, but only as herein provided, and the Attorney General may, upon application, issue permits therefor, but in case the office of Commissioner of Prohibition shall be created, then such Commissioner shall issue said permits; Provided, that nothing in this Act shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in government bonded warehouses."

Motion was made in each case to quash the information, which was denied, and this ruling of the court is assigned as error. However, it will be noticed that the information substantially charges the offense in the language of the statute, perhaps with unnecessary verbiage, but under the rule laid down in People v. Tate, 316 Ill. 52, we hold the information was sufficient.

It is further argued that the evidence failed to prove certain material allegations of the information beyond a reasonable doubt.

purposes. Both intoxicating liquor then and there in the possession of the said * * * not being possessed in his private dwelling while the same was kept and used by him as a private dwelling only. The said intoxicating liquor not then and there being in his possession by virtue of any permit issued by the attorney general or the officer of the Commissioner of Prohibition of the State of Illinois. Both intoxicating liquor then and there being used for commercial, manufacturing, mechanical, chemical or manufacturing purposes, not otherwise legally authorized."

Both counts 3 in as follows:

"No person shall on or after the date when this act goes into effect, manufacture, sell, barter, transport, deliver, furnish or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. Liquor for manufacturing purposes and other for medicinal purposes may be manufactured, purchased, sold, bartered, transported, delivered, furnished and possessed, but only as herein provided, and the Attorney General may, upon application, issue permits therefor, but in case the office of Commissioner of Prohibition shall be vacant, then such Commissioner shall issue the permits; provided, that nothing in this act shall prohibit the purchase and sale of wholesome malt, vinous and alcoholic liquors on deposit in government bond in warehouses."

Motion was made in each case to quash the information, which was denied, and this ruling of the court is assigned as error. However, it will be noticed that the information substantially charges the offense in the language of the statute, perhaps with unnecessary verbiage, but under the rule laid down in People v. Tate, 274 Ill. 32, we hold the information was sufficient.

It is further argued that the evidence failed to prove certain material allegations of the information beyond a reasonable doubt.

It is said in the first place that the evidence failed to show that the liquid in question was fit for beverage purposes. It is true that the information made this averment, which we do not think was a necessary averment but on the contrary may be regarded as surplusage. Indeed, the whole theory of the act in question is that intoxicating liquor is unfit for beverage uses. The intention of the defendant in this, as in all other criminal cases, is the controlling question. It is not argued that the alcohol which was seized was not intended to be used as a beverage, and the evidence shows beyond a reasonable doubt that such was the intention.

In the second place, it is urged that there was no proof of the allegation that the liquor found in possession of the defendants had an alchholic content greater than one-half of one per cent by volume. The proof showed without question that the liquor was alcohol. There was undenied proof of the admission of this fact by one of the defendants in the presence of the others. This fact could also be inferred from the testimony of one of the officers who tasted liquor from both the receptacles which were seized.

The evidence for the People tended to show that at about 9:35 in the evening, police officers saw an automobile standing on the left side of No. 5033 Federal street, in the city of Chicago, and that as the officers approached, this automobile was driven away at a high rate of speed; that there was thrown from it two bags, which were seized by these three defendants, and taken to the rear of the building which stood there, the officers pursuring the defendants as the bags were carried away; that the police caught the three defendants, opened the top of the cans which were found in the bags, and asked what they contained, when one of the three de-

It is odd in the first place that the evidence failed to show that he should be question and it for burning gunpowder. It is true that the determination made this assessment, which we do not think was a reasonable assessment but on the majority may be regarded as conclusive. Instead, the whole theory of the act in question is the intention since it merit for burning guns. The intention of the defendants in this, as in all other criminal cases, is the controlling question. It is not argued that the alcohol which was seized was intended to be used as a beverage, and the evidence does appear a reasonable doubt that such was the intention.

In the second place, it is urged that there was no proof of the allegation that the liquor found in possession of the defendants had an alcoholic content greater than half of one per cent by volume. The point seemed without question that the liquor was alcohol. There was uncontested proof of the existence of this fact by one of the defendants in the presence of the officer. This fact could also be inferred from the evidence of one of the officers the better liquor from the stockyards which were seized.

The evidence for the defense tended to show that at about eight in the evening, police officers saw an automobile standing on the left side of No. 8022 Fairmount Avenue, in the city of Chicago, and that on the officers approached, this automobile was driven away at a high rate of speed; that there was liquor in it two bags, which were seized by these three defendants, and taken to the rear of the building which stood there. The officers pursuing the defendants in the bags were convinced every that the police sought the three defendants, opened the bag of the bags which were found in the bags, and found that contained, some one of the liquor de-

fendants answered, "Alcohol;" that the officers tasted the liquor and that both cans tasted alike; that the cans in question were five-gallon cans.

There can be no reasonable doubt of the defendants' guilt. Aside from other evidence in the record, the fact that the three defendants ran away from the officers carrying the cans of alcohol indicates guilt. The defendants, availing themselves of their constitutional privilege, did not testify. A defendant who had run away from police officers carrying a ham under similar circumstances, might be inferred to be guilty of an intent to eat or sell the ham. These defendants, who under similar circumstances fled from officers of the law with bags containing cans of alcohol, may well be supposed to have intended to drink or sell the liquor.

It is further urged that the cans of alcohol should not have been received in evidence, because the same were taken in violation of the constitutional rights of plaintiffs in error. A motion to suppress the evidence was made on that ground and properly denied. The cases which defendants cite, and upon which they rely, - People v. Castrel, 311 Ill. 392, People v. Prall, 314 Ill. 518, People v. Reid, 315 Ill. 597, People v. Cada, 235 Ill. App. 587, - are easily distinguishable.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

Fenimore answered, "Absolutely!" then his officers barred the lines and that both were backed solely that not even in America were five-million robs.

There can be no reasonable doubt of his deliberate guilt. Quite from other criminals in the remark, the fact that the three defendants had been from the officers arrived, the date of alcohol following guilt. The undersigned, realizing discussions of their constitutional privileges, did not hesitate. A defendant who had run away from police officers carrying a gun never rights, offensively, might be interpreted to be guilty of an intent to use or sell the gun. These defendants, who never should disassociated from officers of the law with high overbidder, were of alcohol. May well be assumed intended to steal or sell the liquor.

It is further argue that the mere of alcohol should not have been received in evidence, because the mere with intent in violation of the unconstitutional rights of citizenship is error. A motion to suppress the evidence was made on the ground and properly denied. The cases relied defendants side, not upon which they rely, - Tinsley v. Cantrell, 121 Ill., 377, Tinsley v. Ethell, 124 Ill. 638, Tinsley v. Ball, 122 Ill. 377, Tinsley v. Cole, 128 Ill. 434, 447, - are easily distinguishable.

The judgment is affirmed.

AFFIRMED.

McCurdy, P. J., and Dibell, J., concur.

84 - 31166

ROBERT E. FERGUSON, for use of OSCAR ABRAMS,
Defendant in Error,

v.

DONALD V. FERGUSON,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

244 I.A. 628

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The garnishee, Donald V. Ferguson, has sued out this writ of error to secure the reversal of a judgment in the sum of $261.44, entered against him on the finding of the court, which seems to have been based upon the answer of the garnishee, no evidence having been offered or received by either party.

The order of judgment provided that execution should be stayed "until twenty days after such date as said garnishee shall have in his possession or control any of the effects of the said Robert E. Ferguson."

The garnishor has not appeared in this court to defend the judgment entered; and it is made to appear that the judgment order was entered in the absence of the garnishee; that although the cause had been continued until 11:00 a. m. on Friday, the 16th day of April, 1926, the garnishee appeared at that time only to learn that judgment had been previously entered. A stenographer also makes affidavit that she appeared in court on that date prior to the time set and remained there until the court adjourned, but that the cause was not called for hearing during that time.

The answer of the garnishee disclosed that the garnishee had an agreement with the judgment debtor whereby certain

MOTION TO MODIFYING
COURT OF CHANCERY.

JOHNSON V. FERGUSON.
Finality in error.

Mr. Justice McCarthy delivered the opinion of the court:

The plaintiff, Harold V. Ferguson, has sued out this writ of error to review the reversal of a judgment in the sum of $2214.44, entered against him on the finding of the court, which seems to have been based upon the answer of the garnishee, no evidence having been offered or received by either party.

The order of judgment provided that execution should be stayed "until twenty days after such date as said garnishee shall have in his possession or control any of the effects of the said Robert L. Ferguson."

The garnishee has not appealed in this court to defend the judgment entered, and it is safe to assume that the judgment order was entered in the absence of the garnishee, that although the cause had been continued until 11:00 a. m. on Friday, the 16th day of April, 1926, the garnishee appeared at that time only to learn that judgment had been previously entered. A stenographer's affidavit that she appeared in court on that date prior to the time set and remained there until the court adjourned, but that the cause was not called for hearing during that time.

The answer of the garnishee disclosed that the garnishee had an agreement with the judgment debtor whereby certain

commissions in connection with sales of real estate should be paid to the debtor as and only when the same were collected, but that nothing was in fact due from the garnishee at the time of the service of the writ or at the time of the filing of the answer.

It has been uniformly held that a judgment debtor by process of garnishment can only recover such indebtedness as could have been recovered by an action of debt or indebitatus assumpsit in the name of the attachment or judgment debtor against the garnishee. In other words, an indebtedness which is uncertain and contingent cannot be reached by this process. A few of the cases which so hold are Webster v. Steele, 75 Ill. 544; Swope v. McClure, et al., 239 Ill. App. 578.

The judgment is therefore reversed.

REVERSED.

McSurely, P. J., and Johnston, J., concur.

complaints in connection with sales of real estate should be paid to the owner as and only when the year ends collection, but that making one in fact for the purpose of the time of the service of the writ or in the time of the filing of the answer.

It has been maintained that a judgment right by process of garnishment can only receive such interpretation as could have been intended by an action of debt or indebitatus assumpsit in the case of the garnishee or judgment creditor against the garnishee. In other words, an interpretation which is monetary and contingent cannot be limited by this process. A few of the cases which do exist are [illegible] 27-111-[illegible]; Dunne v. [illegible] et al. 28 Tex. 1866.

"The judgment is therefore reversed.

[illegible]

Motion by [illegible] and [illegible] [illegible]

71 - 31195

TELLER CORPORATION, a corporation, Appellee, v. L. J. LEON MANUFACTURING COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT, OF CHICAGO.

244 I.A. 628

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from an order entered in the Municipal court denying its motion to vacate and open up a judgment theretofore entered by confession upon a written lease for the sum of $437.16.

The plaintiff has not appeared in this court in support of the order entered.

The motion to set aside the judgment was supported by two affidavits executed by the treasurer of the defendant corporation, who averred therein that plaintiff had no authority, right or power to make the lease upon which judgment was confessed without the written consent of the American Furniture Mart, and that such written consent had not been secured.

The affidavit also avers that defendant's by-laws provide that the president and secretary shall execute all leases, and that defendant's secretary shall sign with the president or vice-president in the name of defendant and with authority given by the board of directors so to do; that such authority was not given to execute the lease upon which judgment was confessed.

The affidavit also avers that the only purposes for which the space leased could be used was for exposition purposes;

[illegible]
a corporation,
[illegible]

v.

[illegible]
COMPANY, a corporation,
[illegible]

[illegible] OF [illegible].

[illegible] "[illegible] OF THE COURT".

This is an appeal by the defendant from an order entered in the Municipal Court ordering the motion to vacate and open up a judgment discretionary entered by default upon a written issue for the sum of $227.16.

The plaintiff has not appealed in this court in support of the order entered.

The motion to set aside the judgment was supported by the affidavits executed by the treasurer of the defendant corporation, who averred therein that plaintiff had no authority, right or power to make the issue upon which judgment was confessed without the written consent of the municipal Parliament itself, and that such written consent had not been received.

The affidavit also avers that defendant's by-laws provide that the president and secretary shall execute all issues, and that defendant's secretary shall sign with the president or vice-president in the name of defendant and with authority given by the board of directors so to do; that such authority was not given to execute the issue upon which judgment was confessed.

The affidavit also avers that the only purpose for which the issue could be made was for expenditure purposes

that defendant did not use it, but that the president of defendant had a few pieces of furniture moved into the space and the same remained there from January, 1925, to April, 1925; that for this use of the space, defendant paid the sum of $400, which was more than a reasonable and fair rental for the use of the said premises during said time.

The lease upon which judgment was confessed purported to be executed by its president, and since the affidavit of merits denied his authority to execute a lease with power to confess judgment, we think a meritorious defense was stated.

The lease is not under seal, and the record fails to show any circumstances from which such power of the president might be inferred. Snyder Bros. v. Bailey, 165 Ill. 447; Chicago Tire Co. v. Chicago Nat'l Bank, 176 Ill. 224; State Bank v. Moline Steel Co., 283 Ill. 581.

For the error indicated the order is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Johnston, J., concur.

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110 - 31239

Editor for initial looked

McINERNEY MOTOR CO., a Corporation,
Appellant,

vs.

AUTOMOBILE UNDERWRITERS OF AMERICA,
Appellee.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

244 I.A. 628

See Next opinion

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff corporation sued the defendant in assumpsit on a fire insurance policy, the declaration in its several counts alleging a contract of insurance entered into on November 30, 1923, and also alleging the modification of this contract on March 5, 1924; that the contract was for a term of one year from its date; that on July 3, 1924, while the policy was in force nine automobiles covered by the contract and located at 2459 South LaSalle street were destroyed by fire; that on July 5th plaintiff gave notice of the loss, and on July 19th thereafter delivered a particular account thereof to the defendant and performed all the conditions precedent contained in the policy of insurance; that the defendant refused to pay said damages upon the sole ground that the policy had theretofore been cancelled.

The defendant filed a plea of the general issue and notice of special defenses stated to be that it did not make or deliver a policy of insurance to the plaintiff as alleged, but that on November 30, 1923, it issued a certain policy of insurance to James T. McInerney and Joseph M. McInerney, co-partners, doing business as McInerney Motor Company; that it was then represented to defendant that the property covered by the policy was sole and unconditional in these co-partners; that at the time of the alleged loss there had been a change in the nature of the insurable interest

MALINOWSKY BROS. INC., a
Corporation,
Appellant,

vs.

ATLANTIC INSURANCE CO.
LIMITED,
Appellee.

APPEAL FROM ORDER OF DISMISS
OF COOK COUNTY.

Mr. JUSTICE MACHUNIS DELIVERED THE OPINION OF THE COURT.

The plaintiff corporation sued the defendant in assumpsit on a fire insurance policy. The declaration in its several counts alleged a contract of insurance entered into on December 20, 1923, and also alleging the modification of this contract on March 7, 1924; that the contract was for a term of one year from the latter date; that on January 3, 1924, while the policy was in force the automobiles covered by the contract were located at 2247 South Halsted street; that on July 3, 1924, while the policy was in force there notice of the loss, and on July 10th thereafter delivered a particular account thereof to the defendant and performed all the conditions precedent contained in the policy of insurance; that the defendant refused to pay such damages upon the sole ground that the policy had therefore been cancelled.

The defendant filed a plea of the general issue and notice of special defenses stated to be that it did not make or deliver a policy of insurance to the plaintiff as alleged, but that on November 20, 1923, it issued a certain policy of insurance to James T. Malinowsky and Joseph H. Malinowsky, co-partners, doing business as Malinowsky Motor Company; that it was then represented to defendant that the property covered by the policy was sold and conditional in some manner; that at the time of the alleged loss there had been a change in the nature of the insurable interest

of the subscriber; that Paragraph "3" of the policy provided:

> "3. No action shall lie against the attorney or any of the subscribers at the Exchange to recover for any loss under this contract unless brought by the subscriber himself."

That defendant would show that the subscriber was a co-partnership and not a corporation, and that plaintiff had no insurable interest and no right of action under the policy.

Secondly, that defendant would show by way of defense that the policy was issued to said co-partnership in consideration of a premium which the co-partners thereafter failed and refused to pay, and that by reason of said failure and refusal defendant, on or about April 19, 1924, cancelled and rescinded the said contract of insurance and, in accordance with the provisions of the policy, notified the co-partnership by registered mail that because of the failure of the said co-partnership to pay said premium the policy was cancelled and declared void and of no effect within five days from April 19, 1924, and that said policy of insurance continued and remained cancelled and void and of no effect.

Thirdly, that by the terms of the policy defendant was liable for a loss only if sustained within the contract period, and that by the loss by fire on April 30, 1924, was not sustained within the said contract period, because said policy of insurance had been cancelled on April 19, 1924, and not reinstated or put back into force or effect.

Fourthly, said loss by fire occurred on the morning of July 3, 1924, and that thereafter either the plaintiff or James T. McInerney and Joseph M. McInerney, concealing the fact of the said fire and loss from the defendant, paid to an employee of the defendant a certain sum of money for the reinstatement of said policy of insurance and on, to-wit, the afternoon of July 3, 1924, and that the alleged loss by fire occurred before the risk, said loss being known to James T. McInerney and Joseph M. McInerney, and

without being disclosed to the defendant; that thereafter the defendant, having learned the facts, tendered the return of said amount to the plaintiff.

The cause was submitted to a jury, which returned a verdict for the defendant, and motion for a new trial being overruled, judgment was entered upon the verdict.

The alleged errors assigned and argued are that a new trial should have been granted because the verdict was against the manifest weight of the evidence; on account of erroneous instructions given on behalf of the defendant and proper instructions requested by the plaintiff refused, and because of the admission of improper evidence on behalf of the defendant received over the objection of plaintiff.

The uncontradicted evidence shows that the policy was issued by the defendant on November 30, 1923; that the defendant then had its principal place of business at Dallas in the State of Texas, with a branch office in Chicago, which was in charge of one Curtis as agent for defendant.

The evidence also discloses that from April 19, 1923, until November 28, 1923, Joseph McInerney, James McInerney, and their mother, Rose McInerney, were partners in the business of selling automobiles, the mother, however, not being actively engaged therein; that on November 28, 1923, these partners organized a corporation which took over the business of the partnership, and James and Joseph became officers of the company; that these two, with their mother, held all the stock in the company; that the partnership did business under the name of McInerney Motor Company, and the corporation also used that name.

On November 30, 1923, two days after the incorporation, Joseph McInerney, as secretary, made application for the insurance in question; Mr. Curtis filled out an application for insurance

without being disclosed to the jurisdiction; that Superior the Defendant, having learned the fact, tendered the return of all amount to the plaintiff.

The cause was submitted to a jury, which returned a verdict for the defendant, and motions for a new trial being overruled, judgment was entered upon the verdict.

The alleged errors complained and argued are that a new trial should have been granted because the verdict was against the manifest weight of the evidence; on account of erroneous instructions given on behalf of the defendant; and because instructions requested by the plaintiff refused, and because of the admission of improper evidence on behalf of the defendant regarding the objection of plaintiff.

The uncontradicted evidence shows that the policy was issued by the defendant on December 8, 1911; that the defendant then had its principal place of business at Decatur in the State of Texas, with a branch office in Chicago, which was in charge of one Curtis as agent for defendant.

The evidence also discloses that from April 11, 1911, until December 22, 1911, Joseph Kolcheck, Jerome McCarney, and Peter Walker, Tom Kolcheck, were interested in the business of building wainscoting, the middle, however, not being actively engaged therein; that on December 22, 1911, these partners organized a corporation which took over the business of the partnership, but there was not enough known efficiency of the company; that there was, with their notice, but all the stock in the company; that the partnership did business under the name of Kolcheck Roofer Company, and the corporation in most that name.

On December 27, 1911, two days after the incorporation, Joseph Kolcheck, as president, made application for the insurance in question; Curtis filled out an application for insurance

from information given him by Joseph McInerney, who testifies that he sat in a position from which he could not see what was being written, as the blank was filled, and that after it had been filled out it was shoved across the table to him by Curtis, at whose request he signed it and passed it back to Curtis, without looking at it or knowing its contents. Curtis testified that he did not know whether McInerney read the application; that he had no recollection upon that subject. The application was, however, incorporated in the policy under the Schedule of Warranties, and as so incorporated recited that the "subscriber was a partnership."

Joseph McInerney further testified that when the application was being filled out he told Curtis that the business was a partnership but was then incorporated; while Curtis, on the contrary, testified that he did not ask McInerney who the partners were; that this was immaterial; that it was immaterial whether or not it was a corporation; that it would have been submitted just the same; that the rate would have been the same, and that there was not any difference in the risk.

Mr. Hynes, an underwriter for the home office, also testified that it would not have been of any consequence in the case whether the McInerney Motor Company was a partnership or a corporation; that the rate was the same, and that if they issued insurance they would issue the same one way or the other.

It is suggested in the argument for the defendant that the verdict may be sustained upon the theory that the uncontradicted evidence showed that the policy was for the benefit of the partnership while the loss was sustained by the corporation.

The verdict cannot be sustained on that ground. There is no doubt here as to the identity of the real parties, and it is always permissible to introduce oral evidence for the purpose of identifying the real parties to a written contract. A mere errone-

from interrupting given him by Joseph McCarthy, who testified that he was in a position from which he could not see what was being written, as the sheet was filled, and that after it had been filled out it was moved across the table to him by Curtis, of whom he could be signed it and passed it back to Curtis, without inquiring as to or knowing its contents. Curtis testified that he did not know whether McCarthy read the application; that he had no recollection upon that subject. The application was, however, laboriously perused in the public under the heading of Fairfax, and we so interpreted testified that the "application was in proximity."

Counsel Kilgarvey further contended that when the application was being filled and he told Curtis that the business was a partnership but was then incorporated, while Curtis, on the contrary, testified that he did not ask McKinney was the partnership; that this was immaterial; that it was immaterial whether or not it was a corporation; that it might have been written just the same; that the note might have been the same, but that there was not any difference in the risk.

Mr. Ryan, on cross-examination by the Bank officer, also testified that it might not have been of any consequence in the case whether the Kilgarvey Auto Company was a partnership or a corporation; that the risk was the same, but that it may lessen the chances that would have the same one or the other.

It is suggested in the argument for the defendant that the verdict may be sustained upon the theory that the uncontradicted evidence shows that the policy was for the benefit of the partnership which the law has sustained by its construction.

The verdict cannot be sustained on that ground. There is no doubt that as to the identity of the real parties, and it is always permissible to introduce that evidence for the purpose of identifying the real parties to a written contract. A more proper

ous description of a plaintiff will not render an insurance policy void. It has been uniformly so held in this and other states. (Lumbermen's Mutual Ins. Co. v. Bell, 166 Ill. 400; Malleable Iron Range Co. v. Pusey, 244 Ill. 184; Friend v. Goldsmith, 307 Ill. 45; Buchanan v. Ins. Co., 216 Ill. App. 523; Davis v. Home Ins. Co., 233 Ill. App. 566; Lanning v. Fire Ins. Co., 129 Minn. 66.)

The uncontradicted evidence tended to show that the policy was issued without the payment of the premium, and that the plaintiff, although often requested so to do, failed to pay the premium, which amounted to $175. It seems that $18.44 was paid on account some time prior to April, 1924, and Curtis wrote plaintiff asking in substance whether defendant might not have plaintiff's check for at least a portion of the premium at that time. The evidence further shows that on April 19, 1924, at Dallas, Texas, defendant wrote a letter addressed, "McInerney Motor Co., 2715 S. Cicero Avenue, Chicago, Illinois, calling attention to the provision in the policy with reference to cancellation, and stating:

> "The Automobile Underwriters of America herewith gives five days' formal notice of the cancellation of Policy No. 71251 issued to McInerney Motor Co.******* Please take special notice that all liability of said Exchange under said policy will absolutely cease at noon on the 24th day of April, 1924. We enclose our statement for $51.34 covering the earned premium due in full. Please mail the above policy in the enclosed stamped addressed envelope to complete our files."

A controlling question in the case is whether this notice amounted in law to a cancellation of the policy.

The provision in the policy with reference to cancellation was as follows:

> "This contract may be cancelled at any time by the Exchange by giving to the subscriber five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired term, which excess if not tendered shall be refunded on demand. Notice of cancellation mailed to the address of the subscriber stated in the contract shall be a sufficient notice."

Even if conceded that the notice of cancellation was properly pleaded (which plaintiff denies on the authority of

Gillman v. Ferguson, 116 Ill. App. 347), we do not think the proof is sufficient to sustain the contention of defendant that the policy was cancelled. It will be observed that the notice is dated at Dallas, Texas, on April 19, 1924, and states that the liability of defendant under the policy shall cease at noon on April 24, 1924, which would be five days after the mailing of the notice at Dallas, Texas. Forfeitures are not favored by courts, and they will not be declared if such declaration can be reasonably avoided. Construing the section of the policy recited above in the manner most favorable to the plaintiff, as it is our duty to do, we think it must be held that the five day notice, which is required in order to avoid the policy, means at least five days from the time the notice is received or would in due course of the mails be received by the party to whom it is given. Any other construction might in some cases mean that the policy would be forfeited before the notice would in due course of the mails reach the policy holder. A somewhat similar provision in a by-law of an insurance company has been so construed by the Supreme court of this state in U. S. M. Accident Assoc. v. Carl Mueller, 151 Ill. 254.

There was therefore no evidence in the record tending to show that the policy had been cancelled at the time this loss occurred, and it was therefore error for the court to submit that question to the jury.

The conclusion at which we have arrived on this point will make it unnecessary to discuss other errors assigned and argued, although we will also state that an examination of the record discloses errors as to the admission of evidence and in several instructions given at defendant's request.

For the reasons indicated the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P.J. and Johnson, J., concur.

Gilliam v. Fireman, 124 Tex. App. 1931, we do not think the proof is sufficient to justify the assertion of defendant that the policy was cancelled. It will be observed that the notice is dated at *Dallas*, Texas, on April 19, 1934, and states that the liability of defendant under the policy shall cease at noon on April 24, 1934, which would be five days after the mailing of the notice at *Dallas*, Texas. Postal-cards are not favored by courts, and they will not be declared if some construction can be reasonably evoked. Construing the section of the policy recited above in the manner most favorable to the plaintiff, as it is our duty to do, we think it must be held that the five day notice, which is required in order to avoid the policy, means 24 hours five days from the time the notice is received or would be due course of the mails be received by the party to whom it is given. Any other construction might in some cases mean that the policy would be forfeited before the notice would in due course of the mails reach the policy holder. A reasonable construction in a by-law of an insurance company has been so construed by the Supreme Court of this state in *T. P. R. R. Gentilz Street v. Tyrl Brothers*, 2 S.W. 2d 1. Tex.

There was absolutely no evidence in the record tending to show that the policy had been cancelled at the time this loss occurred, and it was therefore error for the court to submit that question to the jury.

The conclusion at which we have arrived on this point will make it unnecessary to discuss other errors assigned and argued, although we will also state that an examination of the record discloses errors on the admission of evidence and in several instructions given at defendant's request.

For the reasons indicated the judgment will be reversed and the cause remanded.

Modified and a Supplemental Opinion

Filed alone Febry. 21, 1927.

110 - 31239

SUPPLEMENTARY OPINION.

244 I.A. 6234

McINERNEY MOTOR CO., a Corporation, Appellant, vs. AUTOMOBILE UNDERWRITERS OF AMERICA, Appellee.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Since the filing of the opinion heretofore rendered, the plaintiff, appellant in this court, has moved that the order reversing and remanding the cause be modified and that judgment be entered in this court in favor of plaintiff, appellant, and against defendant, appellee, for the sum of $5485.02.

The undisputed evidence shows that the actual loss at the time of the fire was $4899; that that sum became due on the 17th day of September, 1924, and that interest at five per cent upon said amount from that date until the date of the opinion here, February 7, 1927, at five per cent amounts to $586.02, making a total sum of $5485.02.

It was contended by the plaintiff in the trial court that, even if it were conceded that the notice of cancellation was valid and sufficient, nevertheless the uncontradicted evidence showed that it had been in fact waived. This court, being of the opinion that the notice of cancellation was not sufficient, found it unnecessary to decide that question.

As the amount of damages sustained is not disputed, there is no question in the case for a jury, and we think, upon the authority of Kirich v. Forschner Contracting Co., 312 Ill. 343, and Adam v. Columbian Nat'l Life Ins. Co., 218 Ill. App. 54, the motion of the plaintiff should be granted. That part of the order remanding the cause will be set aside. Judgment will be entered here in favor of plaintiff, appellant, and against defendant, appellee, for the sum of $5485.02.

McSurely, P.J., and Johnston, J., concur.

Filed June Febry. 21, 1927.

McCLENDON BROS., a Corporation, Appellant, vs. AMERICAN INSURANCE CO OF BOSTON, Appellee.	Appeal from Mobile Circuit Court. In Equity.

24. IDENTICAL MATERIALLY DIFFERENT FROM OPINION OF THE COURT.

Since the filing of the opinion heretofore rendered, the plaintiff, appellant in this court, has moved that the order reversing and remanding the cause be modified and that judgment be entered in this court in favor of plaintiff, appellant, and against defendant, appellee, for the sum of $2500.00.

The undisputed evidence shows that the notes issue at the time of the fire was $4500, that that was payable on the 17th day of September, 1924, and that interest at five per cent upon said amount from that date until the date of the opinion here, February 7, 1927, at five per cent amounts to $500.00, making a total sum of $5000.00.

It was contended by the plaintiff in the trial court that, even if it were conceded that the notice of cancellation was valid and sufficient, nevertheless the uncontradicted evidence showed that it had been in fact waived. This court, being of the opinion that the notice of cancellation was not sufficient, found it unnecessary to decide that question.

As the amount of insurance involved is not disputed, there is no question in the case for a jury, and we think, upon the authority of Kirby v. Insurance Indemnity Co., 211 Ill. 324, and Lane v. Columbia Ins. Co., 83 Ill. App. 91, the minimum of the liability should be granted. That part of the order remanding the cause will be set aside. Judgment will be entered here in favor of plaintiff, appellant, and against defendant, appellee, for the sum of $2500.00.

Reversed. Judgment.

152 - 31282

MARTIN LUNOW, Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
CHARLES JESDALE, Appellee.	

244 I.A. 628 5

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff sued on a claim for money alleged to have been loaned the defendant with interest thereon, the loan, as alleged, being evidenced by an I. O. U. of the defendant, signed and delivered on November 23, 1918, and acknowledging an indebtedness due on that date of $310. From further memoranda made thereon, it appeared that other sums were advanced and credits given, and that there was a total balance claimed due to the plaintiff at the time of bringing suit, including interest, of $477.22.

The affidavit of merits alleged by way of defense that the plaintiff advanced these sums of money to the defendant, pursuant to the terms and conditions of a written contract made between plaintiff and defendant on September 9, 1918, in and whereby the plaintiff had agreed to furnish the necessary money to defray all expenditures for the application and prosecution of claims for patents on a steel bound box and rotary steel bound box machine, and to defray all expenditures necessary, plus $1,000, for the construction of the said rotary steel bound box machine to be built by the defendant, in consideration of which defendant assigned to the plaintiff a one-half interest in all the patents to be issued.

The trial was by the court without a jury. At the conclusion of the evidence, the court expressed the opinion that the agreement of September 9, 1918, was in the nature of a partnership agreement and constituted a partnership between the plaintiff and

the defendant, and upon the theory that plaintiff's remedy was in a court of chancery where an accounting might be had between the partners, the court made a finding for the defendant, upon which the judgment, in favor of defendant, was entered, from which judgment plaintiff has taken this appeal.

The defendant has not appeared in this court to support the judgment entered, and we have therefore been obliged to consider the case without assistance as to his views of the record.

Upon the trial, plaintiff testified in his own behalf as to the execution of the I. O. U., the correctness of the memoranda thereon, and the amount due, and the instrument was admitted in evidence. He further testified that this money was loaned to defendant after the execution of the written contract on September 9, 1913, and that there was no reason for its execution except that defendant owed plaintiff money; that the money advanced was not used by defendant in making a machine; that defendant told plaintiff he wanted the first loan to pay taxes on his house which was to be sold.

The defendant testified in his own behalf admitting the execution of the I. O. U., and, over the objection of plaintiff, he was permitted to testify that at the time of executing the I. O. U. he had some rent to pay for the shop he worked in and had to pay for power, light and coal to keep the place warm so he could work, and that he asked plaintiff for money to get along with for the advancement of this work; that plaintiff replied, "We have sold this thing; we have entered into a contract and it is all settled now with the Republic Box Company. There is no use of my advancing more money because you will get it all back from the Republic Company. * * * You give me a note for $370, and I will cancel that as soon as we make this deal." Further

the defendants, and upon the theory that plaintiff's remedy was in a court of chancery where an accounting might be had between the parties, the court made a finding for the defendants, upon which the judgment, in favor of defendants, was entered, from which judgment plaintiff has taken this appeal.

The difficulty has not appeared in this court in suppose the judgment entered, but we have thoroughly been critical in examining the case without mentioned in the view of the record.

Upon the trial, plaintiff testified he has run behind in the execution of the I. G. Co. commissary of the partners thereon, and the money due, and the instrument was admitted in evidence. He further testified that this money was loaned to defendant after the execution of the written agreement on September 8, 1919, and that there was no reason for the execution of the instrument that the money was loaned to defendant and plaintiff memory that the money advanced was not used by defendant in making a machine; that defendant told plaintiff he needed the first loan to pay taxes on his house which was to be sold.

The defendant testified in his own behalf admitting the execution of the I. G. Co., and, over the objection of plaintiff, he was permitted to testify that at the time of leasing the I. G. Co. he had some trouble in getting the money in and had to pay far power, light and rent to keep the plant going so he could work, and that he -then plaintiff for money to pay claims with for the advancement of this money that plaintiff replied, "I've been said this things to have extend into a contract and it is all settled now with the insurance company. There is no use of my advancing more money because you will get it all back from the Republic Company. - - - Use this as a note for it, and I will manage that as soon as I get back this load." Further

that plaintiff said, "You know I promised to give you $1,000 on this machine, and we can also take care of that."

Defendant further testified, "I used the money I got from him for expenses such as wood for patterns, for drawing material, for time I put in there as I had no other occupation - in making the machine and box mentioned in this contract. He did not advance any other moneys except this $390. He saw me working on the machine after he advanced the money. I did not complete the machine. I had no money. He paid no more money. I gave him an assignment of the patent at the time he made the contract." The defendant says that he used absolutely none of the money for payment of taxes on his home, but used it to pay some of his current expenses during that period on the shop and his living expenses, and "I borrowed money from Mr. Lunow for living expenses while I was working on the box. In the agreement Mr. Lunow agrees to pay all expenses."

The contract between plaintiff and defendant is in evidence. In Paragraph 2 thereof, plaintiff agrees "to furnish all necessary money to defray all expenditures for the application and prosecution of patents for the said Steel Bound Box and the said Rotary Steel Bound Box Machine." In the third paragraph, plaintiff agrees "to furnish to the said Charles Jesdale sufficient funds to defray all expenditures necessary, plus $1,000, for the construction of the said Rotary Steel Bound Box Machine to be built by the said Charles Jesdale."

We think this contract cannot be construed to require the plaintiff to pay the current living expenses of defendant, and that the fact that defendant gave his I. O. U. for the money advanced shows clearly that the parties did not adopt any such construction of these clauses as defendant claimed.

The plaintiff argues persuasively that the evidence

that plaintiff said, "You know I promised to give you $1,000 on this machine, and we can also take care of that."

Defendant further testified, "I want the money I put from him for expenses such as wood for patterns, for drawing material, for time I put in there as I had no other occupation - in making the machine and been unemployed in this country. He did not advance any other money except this $500. He saw my working on the machine after he advanced the money. I did not complete the machine. I had no money. He said no more money. I gave him an assignment of the patent at the time he made the contract." The defendant says that he spent absolutely none of the money for payment of taxes on his home, but used it to pay some of his current expenses during that period on the shop and his living expenses, and "I borrowed money from Mr. Lamer for living expenses while I was working on the job. In the agreement Mr. Lamer agreed to pay all expenses."

The contract between plaintiff and defendant is in evidence. In paragraph 2 thereof, plaintiff agrees "to furnish all necessary money to defray all expenditures for the application and prosecution of patents for the said Grant Mount that the said Rotary Chest Vomit Box Machine." In the third paragraph, plaintiff agrees "to furnish to the said Charles Hamlin sufficient funds to defray all expenditures necessary, plus $1,000, for the construction of the said Rotary Chest Vomit Box Machine to be built by the said Charles Hamlin."

We think this contract cannot be construed to require the plaintiff to pay the current living expenses of defendant, and that the first time defendant gave him "$1. $1. for the money advanced above clearly that the parties did not adopt any such construction of these clauses as defendant claimed.

The plaintiff testified positively that the principle

of defendant was inadmissible to vary the terms of the I. O. U., citing Mumford v. Tolman, 157 Ill. 258; Murchie v. Peck Bros. & Co., 160 Ill. 175; Weinstein v. Sprints, 234 Ill. App. 492, and many other cases, but whether admissible or not, this evidence is wholly insufficient in our opinion to establish the defense relied on.

The trial court too, we think, erred in construing the contract (which was simply one in substance whereby plaintiff agreed to advance certain moneys to the defendant, an inventor, in consideration of the transfer of an interest in the invention) as a partnership. Indeed, the contract provides for the organization of a corporation to manufacture the articles covered by the patents and to sell rights under the same.

The Uniform Partnership Act (chapter 106a, Callaghan's Ill. Stat. Anno., vol. 6, in sec. 6 thereof) which defines a partnership also states:

> "Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property or part ownership, does not of itself establish a partnership whether such co-owners do or do not share in the profits made by the use of the property."

See also Hand v. Allen, 294 Ill. 53, and Townsend v. Gregory, 132 Ill. App. 192, where on similar facts to those which here appear the courts held a partnership was not created.

It follows in our opinion that plaintiff was entitled to recover, and the judgment is therefore reversed with a finding of facts and judgment here for the amount of $477.22.

REVERSED WITH FINDING OF FACTS
AND JUDGMENT HERE.

Johnston and M
McSurely, P. J., and Johnston, J., concur.

of defendant was immaterial to vary the terms of the I. O. U.,
citing Bradford v. Tolman, 147 Ill. 288; Burchfie v. Peck Brew. Co.,
[illegible]. 260 Ill. 1[illegible]; Johnston v. Pringle, 266 Ill. 4[illegible], and
many other cases, but whether [illegible] or not, this evidence
is wholly insufficient in our opinion to establish the defense
relied on.

The final count has, we think, erred in construing the
contract (which was simply one in substance whereby plaintiff
agreed to advance certain money in the [illegible], as loaned,
in consideration of the transfer of an interest in the [illegible]
as a partnership. Indeed, the contract provides for the [illegible]-
mission of a corporation to manufacture the articles covered by
the patents and to sell rights under the same.

The Uniform Partnership Act (chapter 104, Ill. Stat.'s
Ill. Stat. Ann., vol. 6, in sec. 6 thereof) which defines a
partnership also states:

> "Joint tenancy, tenancy in common, tenancy by
> the entireties, joint property, common property or
> part ownership does not of itself establish a part-
> nership, whether such co-owners do or do not share
> in the profits made by the use of the property."

See also Hand v. Allen, ub. Ill. 4[illegible], and Jackson v. Stanfield,
[illegible] Ill. [illegible]. pp. 320, where an similar cases to these which have
[illegible] the courts hold a partnership has not arisen.

It follows in our opinion that liability was sustain
to recover, and the judgment is therefore reversed with a
finding of facts and judgment made for the amount of $[illegible].

REVERSED WITH FINDING OF FACTS
AND JUDGMENT MADE.

Johnston and
McGuire, J.J., and Jones, J., concur.

152 - 31282

FINDING OF FACTS.

We find as ultimate facts in this case that the defendant is indebted to the plaintiff for money loaned to defendant by plaintiff at defendant's request in the sum of $384, together with interest thereon from October 15, 1920, at the rate of five per cent per annum, amounting to $93.22, and making a total sum due from defendant to plaintiff of $477.22, for which sum we find the plaintiff is entitled to judgment.

ZZZ - 31290

VERDICT OF JURY.

We find as ultimate facts in this case that the defendant is indebted to the plaintiff for money loaned, in defendant by plaintiff at defendant's request in the sum of $[illegible], together with interest thereon from October 22, 1920, at the rate of five per cent per annum, amounting to $[illegible], and making a total sum due from defendant to plaintiff of $[illegible], for which sum we find the plaintiff is entitled to judgment.

182 - 31314

R. C. LANGAN, Appellee,	APPEAL FROM
v.	CIRCUIT COURT,
FRANK LOVELL and G. P. LAMBERTON, Appellants.	COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff sued in assumpsit upon a promissory note and upon trial by jury a verdict was given in his favor for the sum of $1,559.65, upon which the court, overruling motions for a new trial and in arrest, entered judgment.

The defense relied upon was that the note was given without consideration, and it is argued that the verdict of the jury is against the manifest weight of the evidence.

The plaintiff upon the trial produced the note, and the same was offered and received in evidence. He further testified that payment had been demanded, that he saw Mr. Lovell and Mr. Lamberton sign the note, and that it was given for $1,235.29, which the Model Auto Company owed plaintiff for the rental of a garage.

The defendant testified that he told plaintiff "I would give the note temporarily, until the Model Auto Company made collections on open accounts to pay this indebtedness. Mr. Langan agreed to this and I told him to have Mr. Lamberton sign it with me."

On cross-examination, defendant testified that Lamberton, the other signer of the note, and he, defendant, were in the automobile business together at Clinton, Iowa, from 1912 to 1923, and that they did business under the

R. G. LAWSON,
Appellee,

v.

TRAVEL INSURE and
G. F. LAMBERTON,
Appellants.

AUSTRAL NOTE
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT:

The plaintiff sued in assumpsit upon a promissory note and upon trial by jury a verdict was given in his favor for the sum of $1,890.00, upon which the court, overruling motions for a new trial and in arrest, entered judgment.

The defense relied upon the fact that the note was given without consideration, and it is argued that the verdict of the jury is against the manifest weight of the evidence.

The plaintiff upon the trial produced the note, and the same was offered and received in evidence. Mr Turner testified that payments had been demanded, that he saw Mr. Lovell and Mr. Lamberton sign the note, one that it was given for $1,888.00, which the Model Auto Company owed plaintiff for the rental of a garage.

The defendant testified that he told plaintiff "I would give the note temporarily, until the Model Auto Company made collections on some accounts to pay this indebtedness. Mr. Lawson agreed to this and I told him to have Mr. Lamberton sign it with me."

On cross-examination, defendant testified that Lamberton, the other signer of the note, and he, defendant, were in the automobile business together at Chicago, Iowa, from 1912 to 1917, and that they did business under the

name of Model Auto Company; that on July 19, 1922, he sold out and didn't give this note until he was out of the company; that at that time the Model Auto Company owed Mr. Langan four or five months rent, and that the Model Auto Company afterwards went into bankruptcy.

Defendant further denied testimony of plaintiff to the effect that plaintiff has said he would attach the accounts of the Model Auto Company unless he received the note.

The burden of proof was upon the defendant to establish the defense of want of consideration by a preponderance of the evidence. McMicken v. Hofford, 197 Ill. 540; Lehlotter v. Triebel, 284 Ill. 412. We think the jury could fairly infer from defendant's own evidence that the note was given for an indebtedness of the makers. Even if this were not so, the jury nevertheless could believe from the evidence that plaintiff refrained from exercising his legal right to attach the accounts of the Model Auto Company. In either case, there would be ample consideration for the note. The defense is without merit and the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

name of Model Auto Company; that on July 20, 1934, he said was and didn't give this note until he was out of the company; that at that time the Model Auto Company owed Mr. Langum four or five months rent, and that the Model Auto Company afterwards went into bankruptcy.

Defendant further denies insolvency or plaintiff to the effect that plaintiff has said he would attack the economic of the Model Auto Company unless he received the note.

The burden of proof was upon the defendant to establish the defense of usury by a preponderance of the evidence. Mattingly v. Dalton, 207 III. 8013 Mahaffey v. Triplett, 224 III. 419. In order the jury could fairly infer from defendant's own evidence that the note was given for an indebtedness of the maker, even if this were so, the jury nevertheless could believe from the evidence that plaintiff refused from exercising his legal right to attack the economic of the Model Auto Company. In other words, there is no ample consideration for the note. The defense is without merit and the judgment is affirmed.

AFFIRMED.

Burnsley, P. J., and Johnson, J., concur.

241 - 31373

A. O. ELTING,
Appellant,

vs.

AREX COMPANY, a Corporation,
J. C. KERNCHEN COMPANY, a
Corporation, and J. C. KERNCHEN,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

244 I.A. 629

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainant from an order which sustained the general and special demurrers of defendants, J. C. Kernchen Company, a corporation, and J. C. Kernchen, to the bill as amended, held the plea of the defendant Arex Company to be legally sufficient in substance and form, and upon complainant electing to abide by his bill as amended, dismissed the same for want of equity.

The bill as amended was based upon the following written instrument:

> "September 4, 1920. Mr. A. O. Elting, 1217 Arthur Avenue, Chicago, Illinois. Dear Sir: In accordance with our verbal agreement of this date, we hereby appoint you to the position of General Manager of the Arex Company, on a basis of a yearly drawing account of $10,000.00 payable monthly. This compensation to be applied against the gross sales of this company, at the rate of 7½% commission on the first $150,000.00 and 5% commission on everything over this amount. Yours truly, Arex Company, By J. C. Kernchen, President. Accepted: A.O.Elting."

The bill as amended avers that immediately thereafter complainant entered upon his employment and acted as such general manager until the 22nd day of January, 1922, during which time he received and credited the sum of $10,930, "being the compensation received from the said J. C. Kernchen and the Arex Company to date of filing his bill of complaint."

It is also averred that Kernchen was during all this time the sole owner of the capital stock of the Arex Company, and that during that time Kernchen, through stock ownership, came to be

the owner and in control of the J. C. Kernchen Company, an Illinois corporation; that he located the company in the offices of the Arex Company and placed the management and control thereof in the hands of complainant, and that complainant acted as general manager of the J. C. Kernchen Company from the middle of December, 1920, until January 22, 1922; that complainant assumed that Kernchen, being the owner of both companies, was authorized to extend the contract of employment and that he so did, and that complainant performed faithfully all duties connected with the function of general manager of the J. C. Kernchen Company for said period of time, but received no further compensation therefor, and that he was induced so to do by the understanding that the written contract covered his employment as such.

The bill further alleges that the contract is ambiguous and capable of two or more meanings as applicable to payments, in that drawing account may be construed as advances in the way of loans, or may be construed as fixed liability as salary, but avers that both parties construed the same to mean salary; that upon such construction, there was due to complainant the sum of $2500 from the Arex Company under said contract; that the books, sales records and accounts, whereby he could show money due and owing for services in the construction of the contract as advances by way of loans, were in the possession of the defendants, and that he had no means of showing the same, and therefore asked that the defendants make discovery of the same; that he had from time to time requested an accounting, which had been denied.

By an amendment to the bill it was averred that the account of complainant was entered upon the books of both the Arex Company and the J. C. Kernchen Company, in regard to services rendered under said contract, as evidenced by payments of same by

the owner-cut is control of the T.C. Hamilton Company, an Illinois corporation; that he located the company in the offices of the Hamilton Company and placed the management and control thereof in the hands of nominees, and that complainant acted as general manager of the T. C. Hamilton Company from the middle of December, 1920, until January 28, 1922; that complainant assumed that knowledge, being the owner of this company, was authorized to attend the meetings of complainant and the Hamilton Company, and that complainant participated in all duties connected with the functions of general manager of the T. C. Hamilton Company for said period of time, but received no further compensation therefor, and that he was induced to do so by the understanding that the action contemplated should be taken, and as such.

The Bill further alleges that the contract is unjustness and unconscionable for or more reasons as specifically set forth in that document cannot be construed as arrangements in the way of loans, or can be considered as fiduciary in nature, but were that both parties contemplated the same liability, that upon that contingency, there was due to complainant the sum of [illegible] from the Hamilton Company jointly and severally; that the Hamilton, which presumes and assumes, refuses to equip this money the, in letting for services in the construction of the contract on alleged by way of loans, were in the possession of the defendants, but that to had no means of getting the same, and therefore about that the defendants made disbursements of the money that he had from time to time expended on account, which had been lost.

By an examination of the bill it was asserted that the amount of complainant was entitled upon the books of both the Hamilton Company and the T. C. Hamilton Company, in regard to services rendered under well contract, as evidenced by payments or made by

both companies; that complainant rendered such services to both companies concurrently, understanding that the percentage based on his contract as modified covered the sales of both companies, and that it was necessary to adjust the amount of sales of both companies for said term as co-partners in the employment of complainant under the arrangement created between them by the said J. C. Kernchen, the other defendant, and between them and him as to said arrangement.

It was averred that the sales of each company amounted to a sum exceeding $75,000; that a large number of sales had not been entered in the books until after the termination of complainant's employment, which sales should have been credited to the complainant; that complainant was charged with large sums of money paid out for the conduct of the business, which should have been charged to the business; all of which made the accounting complicated and difficult to present to a jury;

That during complainant's employment both defendant companies occupied the same offices under complainant's supervision; that during that time complainant reported and applied to J. C. Kernchen as the sole owner and director of the operations of the defendant companies; that at the time of the execution of the contract Kernchen told complainant that complainant was responsible to him; that he expected him to take up all matters in connection with the operation of the companies with him;

That the contract was without the seal of the defendant corporation and was in fact made with the said Kernchen in the name of said defendant corporation to be paid out of the funds of the said corporation as operation expense and was so construed with reference to the J. C. Kernchen Company also.

The prayer of the bill was that the defendants should answer and on accounting defendants, or one of them, be decreed to pay the amount found due.

both companies; that complainant rendered such services to both companies successively, understanding that his services based on the contract as modified covered the debts of both companies, and that it was necessary to adjust the amount of debts of both companies for said term on co-partners in the employment of complainant under the arrangement created between them by the said J. G. Simmons, the other defendant, and between them and him as to said arrangement.

It was proved that the value of such company amounted to a sum exceeding $75,000; that a large number of notes had not been entered in the books until after the termination of complainant's employment, which notes should have been credited to the co-plaintiff; that complainant was charged with large sums of money paid out for the conduct of the business, which should have been charged to the business; all of which made the accounting complicated and difficult to present to a jury.

That during complainant's employment both defendants communicated the same offices under complainant's supervision; that during that time complainant received and replied to J. G. Simmons as the sole owner and director of the revenues of the business; complainant, that in the view of the character of the contract Simmons had complained that complainant was responsible to him; that he expected him to look up all matters in connection with the operation of the business with him;

That the contract was without the seal of the defendant corporation and was i. that such act had been ratified by the same of said defendant corporation to by part of the funds of the said corporation as operation expense and was so construed with reference to the J. G. Simmons company also.

The prayer of the bill was that the defendants should answer and on accounting defendants, or one of them, be decreed to pay the amount found due.

The defendants, J. C. Kernchen and J. C. Kernchen Company, assigned as reasons for a special demurrer that the bill was multifarious and that it appeared therefrom that the complainant had a full, adequate and complete remedy at law.

The Arex Company filed its plea, in which it alleged that prior to the beginning of this suit, on June 26, 1922, in the Superior court of Cook County, complainant brought an action in assumpsit as plaintiff against said defendant, as sole defendant, claiming damages against the defendant in the sum of $3,000, and filed a declaration in this law suit consisting of the common counts with an affidavit of claim, alleging that after allowing all credits, defendant was indebted to him in the sum of $2066.66; that that suit was based upon the same contract which is here sued on; that the Arex Company filed its plea of the general issue to said declaration, together with an affidavit of merits denying liability; that the cause came on to be heard on March 25, 1925, before a judge and a jury upon evidence offered by the parties, and that at the conclusion of all the evidence a verdict was returned in open court by the jury upon the direction of the court, finding the issues in favor of this defendant upon the merits thereof; that motions for a new trial and in arrest of judgment were heard and over-ruled by the court and judgment entered upon the verdict on the merits of the cause in favor of defendant and against the complainant as plaintiff, and that thereby the identical rights, claims, interests and demands asserted, alleged and averred by the complainant in his bill of complaint, were fully and completely determined, adjudicated and established against him and in favor of the defendant, and that the said former action at law, the several proceedings had therein, and the final judgment still remained in full force and effect, unreversed, unappealed from and not vacated.

It is quite difficult to understand upon what theory the

bill as amended could be sustained, and it certainly sets up no cause of action as to J. C. Kernchen personally, for the contract upon which it is based shows clearly that he acted only in a representative capacity. There is a wealth of authority to the effect that an officer of a corporation is not personally liable upon an instrument which is executed by him in the name of the corporation. A few of the many cases which might be cited are Wiers et al. v. Coates, 87 Ill. App. 216; Thompson v. Hasselman, 131 Ill. App. 257; Darby v. Gustafson, 131 Ill. App. 281; Northeastern Coal Company v. Tyrrell, 133 Ill. App. 472.

It is clear from the averments of the bill that J. C. Kernchen acted only in a representative capacity, and that he is not personally liable on the contract. He was therefore improperly joined as a defendant to the bill.

It is also clear from the facts set up in the plea, replication to which was waived by the complainant, that complainant has no cause of action against the Arex Company; that he elected to bring suit at law upon the contract with respect to the same matters which he seeks to litigate here, and that these matters having been litigated and determined in the forum of his own choice, he cannot successfully now maintain a suit in a court of equity upon these matters. If he had recovered in the suit at law, his contract would have been merged in the judgment, and not having recovered his rights against the defendant Arex Company under this contract, have been finally adjudicated. Fleming, Trustee, v. Ross, 125 Ill. App. 265.

It follows of course that if the defendant J.C.Kernchen Company owes complainant anything for the alleged services rendered to it by him, his remedy at law would be ample and complete.

The decree is affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

bill as amended could be maintained, and is particularly made up on cause of action in M. G. Berkman personally, for the contract upon which it is based above clearly that he acted only in a representative capacity. There is a wealth of authority to the effect that an officer of a corporation in his ministerial liable upon an instrument which is executed by him in the name of the corporation. A few of the many cases which might be cited are: Kline v. Baker, 99 Ill. App. 648; Thompson v. Thompson, 126 Ill. App. 227; Taylor v. Davidson, 141 Ill. App. 383; Lorillard Tobacco Company v. Jewell, 242 Ill. App. 474.

It is clear from the provisions of the bill that G. G. Berkman acted only as a representative capacity, and that he is not personally liable on the contract. He was therefore improperly joined as a defendant in the bill.

It is also clear from the facts set up in the bill, relation to which was waived by the demurrer, that complainant has no cause of action against the Area Company that he claims of to bring suit at law upon the contract with respect to the same matters which he seeks to litigate here, and that these matters have been litigated and determined in the Court of his own choice, he cannot successfully maintain a suit in a court of equity upon these matters. If on the contrary in the suit at law, his contract would have been misused in the judgment, and not having waived the rights against the defendant Area Company under this contract, then they clearly relinquished.

It follows of course that if the defendant A.A.Berkman Company was complainant supplying for the alleged services rendered as is by him, his remedy at law would be again not equitable.

The decree is affirmed.

AFFIRMED.

Scherry, P. J., and Sabatine, J., concur.

314 - 31446

PRESTON W. HARDIE, CHARLES L. HAMILTON and JACOB E. LEWMAN, Copartners, Trading as HARDIE, HAMILTON AND LEWMAN, Appellants, vs. SAM VELDKAMP, Appellee.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

244 I.A. 629[3]

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiffs sued in trover for one thousand sacks, 308 pounds of onion seed and 1848 bushels of onions, of the value, as alleged, of $5,000.

There was a plea of not guilty, trial by jury, and at the close of all the evidence the court instructed the jury to find the defendant guilty and assess the damages at $40. The verdict was returned as directed, a motion of plaintiffs for a new trial over-ruled, and judgment entered on the verdict.

The evidence tended to show that plaintiffs are in business at Louisville, Kentucky, buying and selling onion sets, a business in which they have been engaged for thirty years; that the defendant is a farmer at Lansing, Cook County, Illinois; that in March, 1924, Mr. Menigenburg, acting as agent for plaintiffs, delivered to the defendant 300 pounds of onion seed and told defendant that plaintiffs would give him five cents more per bushel for onions grown from this seed than the customary price paid by other dealers. In compliance with that agreement the seeds were furnished by the plaintiffs to the defendant.

Later in the summer one of the plaintiffs, Mr. Hamilton, together with Mr. Menigenburg and Mr. Dillner, went to the farm of the defendant to inspect and look over the growing crop raised from this seed. At that time Mr. Hamilton asked the de-

fendant where the crop was, and the defendant took him into the field where the particular crop from this seed was indicated by stakes and said, "Here is yours." Defendant also stated that at that time he thought the crop would produce between seven and eight bushels to the pound.

In October, 1924, (that being the time to harvest the onions), Mr. Hamilton and Mr. Reigenburg again went to the farm of defendant, and the evidence shows that Mr. Hamilton told the defendant that he had come to receive the onions. Defendant replied that he knew nothing about it, and upon being reminded of the fact that he had before this shown to the agent of the plaintiffs the onion sets growing in the field, replied that he knew nothing about it. Plaintiffs sent defendant one thousand sacks to be used in sacking the onions, and afterwards visited the defendant and made a demand for them. After reading this demand, the plaintiffs tendered him in money $1734.40, which defendant refused to accept. Mr. Reinigenburg testified that at that time he said to the defendant, "I told him I didn't want to get him or anyone else in trouble, but that he wasn't doing the right thing, and unless he came up and did what was right he was going to get in trouble; then he said, 'I never have refused to deliver those sets.' He said, 'Give me two days to think this over.'"

The evidence further tended to show that the market value of onions in October, 1924, was two dollars a bushel. The market price of the bags was four cents each, and it is apparent that the instruction given by the court was upon the theory that the defendant was liable for the value of the bags but that he was not liable in this action for the non-delivery of the onions.

The controlling question in the case is whether the plaintiffs are entitled under the evidence to recover the value of the onions.

Fortune views the area rue, at the different ends are into the
field where the matrimonial area fair tale ever was indicated by
shadows and will. Time is years." Information also which that is
that time be through the area would wishes between some our right
burials in the ground.

On October, 1976, (1) week, the line is burned the
colonel, Mr. Smallies and Mr. Independent which was in the face of
defendant, and the prisoner where that Mr. Smallies will use the
fortune that he had come to receive the unions. Defendant replied
that he knew nothing about it, and upon being questioned at the
fact that he had before this where he the colonel or the elizabeth
the union was growing in the field, replied that he knew nothing
about it. Elizabeth and defendant was thereupon asked to be seated
in another the colonel and afterwards visited the defendant and
made a report the town. After reading this report, the elizabeth
declared the union (Ltd.&c), which defendant refused to accept.
Mr. Smallies testified that he also came to meet to the do-
fendant, "I told him I did not want to get his or anyone else to
trouble, but since he wants going the elder thing, and unless he
come up and did what was right for me going to get the elizabeth then
he said, 'I never was called to bring some one.' He said,
'Give me two days to bring the area.'"

The witness further testified to what the colonel
felt of unions to number, 1976, was the bishop's house. The
marriage union of the lady was that house, but it is contend
that the constitution given by the court was upon the lady that
the defendant was liable for the value of the lady but that he
was not liable to pay under the domestic of the union.
The contributing question is as how it produce the
elizabeth was married after the unions to prove the value of
the union.

This action was in trover, and in order to maintain that action it is necessary to show a right of property and possession in the plaintiff who sues. There is no doubt that growing crops, still annexed to the soil, may be sold as personal property and that an actual manual delivery is not necessary in order to vest the title in the vendee. It was so held in Hull v. Griswold, 19 Ill. 631; Graff v. Fitch, 58 Ill. 373; The Dean v. Willits, 81 Ill. 356, all of which cases were decided prior to the enactment of the Uniform Sales Act approved June 29, 1915, see Smith-Hurd's Illinois Rev. Stat. 1935, chap. 121½, p. 2261. We do not find anything in the briefs which indicate that the statute has in any way changed that general rule. These decisions hold (as the statute also declares, see secs. 17 to 19) that in contracts of sale no property in the goods is transferred to the buyer unless or until the goods are ascertained, and that where there is a contract to sell specific or ascertained goods, the property is transferred to the buyer at such times as the parties to the contract intend to be transferred.

These sections further provide in substance that for the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case. The second rule for ascertaining the intention is: "Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done."

As the defendant points out, the evidence here does not disclose whether the crop pointed out was ever harvested, or if it was, how many bushels or crates were produced. The proof also as to the contract itself is very indefinite in that it does not appear when or where the crop purchased was to be delivered, nor is there

[illegible] — This action was in trover, and in order to maintain such action it is necessary to show a right of property and possession in the plaintiff who sues. There is no doubt that growing crops, still annexed to the soil, may be sold as personal property and that an actual manual delivery is not necessary in order to vest the title in the vendee. It was so held in [illegible] 30 [illegible]. 694; [illegible], 84 Ill. 370; [illegible], 88 Ill. 488, and of which cases very lengthy quotations in the majority of the Supreme Court in [illegible], are inapplicable here. [illegible], 1878, [illegible] v. [illegible]. To do so (for [illegible] in the [illegible] which indicate that for trades [illegible] general rule. These decisions hold (as the majority also decisions and cases. 17 to 19) that an agreement of sale of property in the crops be transferred to the buyer either or until the crops are matured, and that where there is a contract to sell growing or unmatured crops, the property is transferred to the buyer at such time as the parties to the contract intend to be transferred.

Those decisions further provide in substance that for the purpose of ascertaining the intention of the parties, regard must be had to the terms of the contract, conduct of the parties, nature of trade and the circumstances of the case. The one- and rule for ascertaining the intention is: "Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done."

[illegible] the defendant points out, the evidence here does not disclose whether the crop planted had ever harvested, or if it was, has ever produced or matured any product. The proof also as to the contract itself is very indefinite in that it does not appear when or where the [illegible] was to be delivered, nor is there

definite evidence of the price that was to be paid.

If the title and right of possession passed to the plaintiffs, then in case the crop was destroyed plaintiffs would have been the losers. We find it difficult to believe that if this crop had been destroyed, plaintiffs would have admitted the loss was upon them.

Plaintiffs may have had a right of action for the failure of defendant to deliver the crop of onions as agreed, but the property not having been definitely ascertained and there being no evidence in the record tending to show that it was the intention of the parties that the right of property and possession should pass prior to the demand, their remedy, if any, was not by way of trover for conversion but upon the contract for failure to deliver according to its terms.

The judgment is affirmed.

AFFIRMED.

McBurely, P. J., and Mehnston, J., concur.

356 - 31488

OTTO BACH and OTTO A. BOEDEKER, Appellee, vs. NATHENIA PATTEE, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff sued in forcible detainer to recover the possession of the premises described as 57 West Elm street, Chicago. The cause was heard by the court, there was a finding against the defendant and judgment thereon, from which this appeal has been perfected.

The plaintiffs have not appeared in this court to support the judgment.

The evidence tends to show that one of the plaintiffs, Boedeker, was in possession of the premises jointly with defendant as a co-lessee; that he and defendant were conducting a rooming-house business together; that defendant gave Boedeker a chattel mortgage covering her interest in the lease and furniture to secure a note of $1400; that although the business was apparently prosperous and the rent as it came due upon the lease paid by the defendant and her note was not yet due, Boedeker, upon the pretense that he felt insecure and unsafe, took possession under the chattel mortgage and pretended to sell the lease to his co-plaintiff, Otto Bach.

Thereafter Boedeker and Bach jointly brought this action to secure exclusive possession.

Defendant contends that the statute does not give a right of action for possession in such case, and that the court was therefore without jurisdiction; that there is a misjoinder of

[illegible] and [illegible] S.
BRANCHES,
Appellees,

vs.

ANTONIA PAINER,
Appellant.

VI. PLAINTIFF MAINTAINED HIMSELF THE OWNERSHIP OF THE GOODS.

The plaintiff used in possible demurrer to recover the possession of the premises described on the first the attorney. Judgment. The cause was heard by the court, there had a finding against the defendant and judgment thereon, from which this appeal has been prosecuted.

The plaintiff's claim has relevant in this court to support his.

The evidence tends to show that one of the plaintiff's father, was in possession of the premises jointly with defendant as a co-tenant; that he and defendant were constituting a remaining house business together; that defendant gave Theodore a deed, without conveying her interest in the house and furniture to secure a note of $1000; that although the testimony was adversely pressure one and the rent as it was due the house the lease paid by the defendant and her note was not pay the. Therefore, when the premises this be full interest and usefulness, this proceeded under the dwelling arrangement and petitioned in will the lease to his co-plaintiff, the then.

Therefore Theodore and that judge through this action to assure ownership possession.

Defendant contends that the statute does not give a right of action for possession in such case, and that the court was therefore without jurisdiction; that there is a mistaken of

parties plaintiff, and that a joint tenant cannot maintain an action to recover exclusive possession from his co-tenant.

This last proposition we have held recently to be the law in Markowicz v. Kowicki, 219 Ill. App. 334.

There are many reasons (unnecessary to discuss) which would justify the reversal of this judgment, and it is therefore reversed.

REVERSED.

McSurely, P. J., and Johnson, J., concur.

[illegible] plaintiff, not that a joint tenant cannot maintain an action to recover exclusive possession from his co-tenant.

This last proposition we have held recently to be the law in Brownlow v. Tarbell, 126 Ill. App. 329.

There are many reasons (illegible) to demand; such demand justify the recovery of this judgment, and it is therefore reversed.

REVERSED.

Dougherty, P. J., and Freeman, J., concur.

31628

REMBRANDT LAMP CORPORATION, a Corporation, Appellee, vs. WILLIAM ABRAMS et al., Appellants.	INTERLOCUTORY APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

244 I.A. 629

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by William Abrams, Jack W. Cohen, Louis Isaacson, Ben Isaacson, Robert Bloom, Benjamin Lerman, and the Metalcrafts Corporation, the defendants, from an interlocutory order granting an injunction against the defendants in a suit in equity brought by the Rembrandt Lamp Corporation, the complainant.

The questions presented for review are raised by a general demurrer of the defendants to the bill of complaint.

The substance of the allegations of the bill are that the complainant is an Illinois corporation with a paid capital stock of $750,000, engaged in the business of manufacturing floor and table lamps of wood, wrought iron, etc., and lamp shades of silk and other materials; that its principal place of business is in the city of Chicago, state of Illinois; that a good will and trade reputation has been developed in the lamp industry that is of great value; that it has a well trained organization of employees, laborers, carvers and mechanics; that it has 405 employees in its factory and shipping department, more than 30 employees in its office and more than 20 salesmen; that the loyalty and devotion of the employees to the business are factors essential to the success and the development of the business; that the confidence of the employees that they will be treated fairly by the complainant is an asset of considerable value to the complainant;

That the defendants William Abrams, Jack W. Cohen,

STATE

AMERICAN LAMP CORPORATION, a Corporation, Respondent,	
vs.	
WILLIAM ADAMS et al., Respondents.	

INTERLOCUTORY
FINAL DECREE DENYING MOTION
TO DISMISS BILL OF COMPLAINT.

24 F.T.C. 629

Mr. Charles Morgan overruled the motions of the owners.

This is an appeal by William Adams, Owen T. Cadman, Lydia Lawson, Sue Lawson, Robert Sloan, Benjamin Lawson, and the Metalwork Corporation, the defendants, from an interlocutory order granting an injunction against the defendants in a suit in equity brought by the American Lamp Corporation, the complainant.

The questions presented for review are raised by a general demurrer of the defendants to the bill of complaint.

The allegations of the allegations of the bill are that the complainant is an Illinois corporation with a paid capital stock of $750,000, engaged in the business of manufacturing floor and table lamps of wood, crystal glass, etc., and lamp shades of silk and other materials; that its principal place of business is in the city of Chicago, State of Illinois; that a good will and trade reputation has been developed in the lamp industry that is of great value; that it has a well trained organization of employees, laborers, porters and workmen; that it has 450 employees in its factory and shipping department, more than 50 employees in its office and more than 30 salesmen; that the loyalty and devotion of the employees to the business and fidelity exercised by the owners and the officers of the business; that the continuity of the employees that may will be impaired fatally by the encouragement in an amount of considerable value to the complainant;

Louis Isaacson, Ben Isaacson, and Robert Bloom were at one time in the employ of the complainant, but that their employment is now terminated;

That Murray H. Lewis is in the employ of the complainant in the capacity of advertising man and sales manager;

That the defendants William Abrams, Jack W. Cohen, Louis Isaacson and Ben Isaacson entered into a conspiracy, beginning in February, 1926, to injure and ruin the business of the complainant by "actively, maliciously and unlawfully endeavoring to persuade certain employees of your orator to leave the employ of your orator and by interfering with and molesting your orator and its employees by the false, fraudulent, malicious means hereinafter set forth, for the sole purpose of obstructing and disorganizing your orator's business and harming and injuring your orator and its stockholders; that said defendants did unlawfully enter into a combination and conspiracy to injure your orator, in undermining the confidence reposed in your orator by its employees and by destroying their spirit of loyalty towards your orator and endeavoring to entice away the employees from your orator and inducing and endeavoring to induce them to leave your orator's employ;" that Robert W. Bloom subsequently joined the conspiracy.

The bill then sets forth in detail specific acts of the defendants alleged to be wrongful, which the defendants committed pursuant to the conspiracy, the last of these acts having been committed September 17, 1926. The alleged wrongful acts consisted of statements made by the defendants in conversations with certain employees of the complainant to the effect that the employees would get "a raw deal" from the complainant; that many of the employees of the complainant would soon leave the employ of the complainant; that the employees would be discharged by the complainant; that the employees "inevitably would have to quit" the employ of the com-

Louis Jackson, Ben Isaacson, and Robert Fleming were at the time in the employ of the complainant, but that their testimony is not material;

That George R. Lewis is in the employ of the complainant in the capacity of superintending man and mine manager;

That the defendants William Abrams, Jack V. Baker, Louis Isaacson and Ben Isaacson entered into a conspiracy, beginning in February 1922, to injure and ruin the business of the complainant by "boycott, malicious and maliciously attempting to persuade certain employees of your orator to leave the employ of your orator and by intimidation and maliciously persuading and induce by the fear, threatened, malicious force and violence and fear, the said persons of intimidation and disqualifying your orator's business and hurting and injuring your orator and its stockholders; that said defendants did unlawfully enter into a combination and conspiracy to injure your orator, in undermining the confidence reposed in your orator by its employees and by destroying their morale of loyalty towards your orator and endeavoring to induce and persuade them to leave your orator's employ and interfering with and obstructing the business and industrial and commercial relations of your orator and to induce them to leave your orator's employ;" that Walter E. Glenn subsequently joined the conspiracy.

The bill then sets forth in detail specific acts of the defendants alleged to be wrongful, with the defendants committing persons in the conspiracy, the land of these acts having been committed December 17, 1922. The alleged wrongful acts consisted of statements made by the defendants in conversations with certain employees of the complainant to the effect that the employees would get "a raw deal" from the complainant; that many of the employees of the complainant would soon leave the employ of the complainant; that the employees would be discharged by the complainant; that the employees "shortly would have to only" the employ of the com-

plainant and that it would be better if they left at once; that Abrams was glad that he had left the employ of the complainant; that Abrams, Cohen, Louis and Ben Isaacson had organized a lamp and shade business and "intended to induce" many employees of the complainant to accept employment with the new organization; that "dirty deals" had been "pulled off" in the factory of the complainant; that Lewis was a "crook;" that Lewis and Abrams had been holding meetings with some of the employees of the complainant for the purpose of getting a large number of the employees of the complainant to leave the complainant's employ and to join Abrams and Lewis in a new business; that Lewis "had cancelled some order in anticipation of going into business with one Ross," an employee of the complainant; that Lewis was doing this to build up a following of his own; that Abrams wanted some salesmen and asked an employee of the complainant "to help him out," and "to induce several of the salesmen" of the complainant to leave the complainant; that the organization established by Abrams, Cohen, Isaacson and others "had a line of merchandise that was far better" than the "merchandise offered by the complainant;" that the complainant had been "skinning" people and had been treating their employees "very ungenerously and unfairly;" that the complainant treated its employees in a "very niggardly and selfish manner and that the employees would be much better off if they would leave the employ" of the complainant; that the complainant's methods of doing business "were not clean," and that the men at the head of the complainant's organization were "not white;" that Abrams and Isaacson took some of the employees of the complainant in an automobile to their factory and endeavored to persuade them to accept employment with Abrams and Isaacson; that some of the defendants stated that the employees of the complainant "would not get a square deal;" that Abrams said if he "could get some one to take care of the

selling end" of his business he would "virtually put" the complainant out of business; that the complainant "was about to break its contract with Lewis; that Lewis would be discharged; that as soon as Lewis had devoted all of his time and attention to" the complainant's business, and had given complainant "the benefit of his, Lewis', recommendations and ideas" the complainant "would discharge" Lewis; that Abrams "was warning" Lewis "merely as a friend;" that Lewis had "many enemies" in the organization of the complainant, "was disliked by the officers" of the complainant, and that Lewis "had better make arrangements for other employment before he was discharged from" the complainant's employ; that "the officers" of the complainant were "tricky" and "crooked;" that "particularly" A. A. Witz, the president, "was tricky and crooked," and that Lewis "would be discharged;" that it "would be much better" for Lewis "to leave the complainant at once and to take employment with the organization of Abrams and Cohen;" that most of the employees of the complainant were going to leave; that the employees were not loyal; that many of them were ready to leave as soon as Abrams and Cohen "gave the word;" that they "would offer" Lewis a desirable connection with their organization; that "they knew that Lewis could command at least one half million dollars" of the complainant's business; that if Lewis would "associate himself" with Abrams and Cohen he would make very much more money for himself;" that he was "very foolish not to leave" the complainant; that Bloom stated to Lewis that he understood that he, Lewis, was "going to join the Cohen and Abrams organization and congratulated him upon his plan;" that Abrams "was determined to get" Witz "sore against Lewis," and "would not stop at anything;" that Abrams "had no reason" up to the date of July, 1926, "to take any of" complainant's "help," but that "the minute the season commenced and the market conditions warranted,

selling and" of his business to which "virtually all" the complainants were "tied" by contracts; that the complainants "was about to break its contract with Lewis; that Lewis would be discharged; that as soon as Lewis had devoted all of his time and attention to" the complainant's business, and had given complainants "the benefit of his, Lewis', recommendations and ideas" the complainants "would discharge" Lewis; that Abrams "was working" Lewis "merely as a tool;" that Lewis had "many enemies" in the organization of the complainants; "was disliked by the officers of the complainants, and that Lewis "had better make arrangements for other employment before he was discharged from" the complainant's employ; that "the officers" of the complainants were "tricky" and "crooked;" that "particularly" A. A. Fox, the president, "was tricky and crooked," and that Lewis "would be discharged;" that it "would be much better" for Lewis "to leave the complainants at once and to take employment with the organization of Abrams and Cohen;" that most of the employees of the complainants were going to leave; that the employees were not loyal; that many of them were ready to leave to join as soon as Abrams and Cohen "give the word;" that they "would offer" Lewis a lucrative connection with their organization; that "they knew that Lewis could command at least one half million dollars" of the complainant's business; that if Lewis would "associate himself" with Abrams and Cohen he would make very much more money for himself;" that he was "very foolish not to leave" the complainant; that Bloom stated to Lewis that he understood that he, Lewis, was "going to join the Cohen and Abrams organization and complimented him upon his plan;" that Abrams "was interested to get" Lewis "sure against Lewis," and "would not stop at anything;" that Abrams "had no reason" up to the date of July, 1924, "to take any of complainant's trade," but knew "the minute the season commenced and the market conditions warranted,

he would take as many employees as he desired" from the complainant; that Abrams, Cohen and the Isaacsons "were planning on building up an organization of considerable proportions and using as many of" the complainant's "employees for that purpose as they might find convenient;" that one of the officers of the complainant was not friendly with a certain employee of the complainant and was using the employees as an "easy mark;" that certain moneys to the amount of $2500 that the employee had invested with the complainant "were not safe" and that the employee "had better ask for the return" of the money immediately; that the complainant would go into bankruptcy; that the employee "had better quit" the employ of the complainant; that Abrams told Witz that the complainant's employees "were not faithful to him," Witz; that Ross "was deliberately holding back production for the purpose of injuring" the complainant's business, and that other employees were not proceeding as they should in the course of their employment;" that Abrams and Cohen told Witz that Lewis and Ross "suggested to said Abrams that they enter into business;" that Lewis had "double crossed" Abrams; that Lewis was unfaithful to the complainant and that the complainant "ought to discharge him forthwith;" that Lewis had been working upon a certain deal on which a sale of merchandise amounting to about $100,000 was in prospect and that when the organization with Abrams was proposed by Lewis, he, Lewis, cancelled the deal so that the complainant "would not get the benefit of it;" that J. M. Schlifkin, an employee of the complainant, "was offered various inducement to join the organization of Cohen and Abrams "in the capacity of a sales manager;" that Cohen told Schlifkin "it was his intention and the intention of Abrams to induce many people employed" by the complainant to leave the complainant's employ; that Schlifkin and Abrams had a "conversation lasting over four hours, in which

he would take as many employees as he desired" from the complainant; that Abrams, Cohen and the Isaacsons "were planning on building up an organization of manufacturing properties and using as many of the complainant's employees for that purpose as they might find convenient;" that one of the officers of the complainant was not friendly with a certain employee of the complainant and was using the employees on an "easy money;" that certain moneys in the amount of $1000 that the employee had invested with the complainant "were not safe" and that the employee "had better see for the return" of the money immediately; that the complainant would go into bankruptcy; that the employee "had better quit" the employ of the complainant; that Abrams told Willis that the complainant's employees "were not faithful to him," that Isaac "was daily-actually building back production for the purpose of injuring" the complainant's business, and that other employees were not proceeding as they should in the course of their employment;" that Abrams and Cohen told Willis that Lewis had been "negotiating in said Abrams that they order into business;" that Levis had "little record" Abrams; that Lewis was unfaithful to the complainant and that the complainant "ought to discharge him forthwith;" that Lewis had been working upon a certain deal on which a sale of merchandise amounting to about $100,000 was in prospect and that when the organization with Abrams was presented by Lewis, Mr. Lewis, suspecting the fact as the complainant "would get the benefit of it;" that I. S. Smith, an employee of the complainant, "was officer various improvement to join the organization of Cohen and Abrams "in the capacity of a sales manager;" that Cohen told Willis "it was his intention and the intention of Abrams to induce many people employed" by the complainant to leave the complainant's employ; that Smith and Abrams had a "conversation lasting over four hours, in which

Abrams made many slanderous remarks about the complainant and the complainant's organization, and "endeavored to induce" Schlifkin to leave the employ of the complainant and join the organization of Abrams; that Bloom "endeavored to induce" Reed to leave the employ of the complainant and to join the organization of Abrams and Cohen.

The bill states that the allegations in reference to these "acts, statements and conversations," except the conversations of Abrams with Witz and Abrams and Cohen with Witz, are made on information and belief and are stated to be true.

The bill alleges on information and belief that the defendants Abrams, Cohen, Bloom, and Louis and Ben Isaacson have from time to time "endeavored to induce" other employees of the complainant to leave the employ of the complainant, and "in that connection have used slanderous, malicious, false and unfair means."

The bill further alleges that in making the statements and doing the acts complained of, the defendants were not acting within the scope of legitimate trade competition, but were actuated solely with the intent of injuring the business of the complainant.

In respect of the defendants Benjamin Lerman and the Metalcrafts Corporation, the bill alleges as follows:

> "That one Benjamin Lerman has been doing business as Glace Lamp & Shade Co. and that in December, 1925, he became president of the Lerman and Marks Lamp Corporation, and that about May, 1926, an application for incorporation was filed with the Secretary of State by said defendants, or some of them, for a charter for the company by the name of 'Metalcrafts Corporation,' in which said Lerman is designated as President, the said Abrams as Vice-President, and the said Cohen as Secretary and Treasurer, which business is that of the defendants, or some of them, and that said Lerman has likewise, with the other defendants, been actively associated as one of the conspirators for the purpose of committing the wrongs hereinbefore set forth."

The bill further alleges that the defendants have not ceased their improper and unlawful conduct but that they are continuing to pursue a course of conduct similar to that hereinbefore

Albrecht made many alarming threats about the complaint and the conspiracy's organization, and "endeavored to induce" Gabliffka to leave the employ of the complainant and join the organization of Albrecht; that Albrecht "endeavored to induce" Kaal to leave the employ of the complainant and to join the organization of Albrecht and Cohen.

The bill states that the allegations in reference to these "talk, statements and conversations," except the conversations of Albrecht with Vita and Albrecht and Cohen with Vita, are based on information and belief and are stated to be true.

The bill alleges on information and belief that the defendants Albrecht, Cohen, Nixon, and Lewis and Tom Jackson have from time to time "endeavored to induce" other employees of the complainant to leave the employ of the complainant, and "in that connection have used slander, calumny, false and malicious threats."

The bill further alleges that in making the statements and doing the acts complained of, the defendants were not acting within the scope of legitimate trade competition, but were motivated solely with the intent of injuring the business of the complainant.

In respect of the defendants Jackson and the Molecularite Corporation, the bill alleges as follows:

> "That one Tom Jackson has been doing business in Elmo Lamp & Shade Co. and that in December, 1928, he became President of the Lamson and Elmo Lamp Corporation, and that about May, 1929, an application for incorporation was filed with the Secretary of State by said defendants, or some of them, for a charter for the company by the name of 'Molecularite Corporation,' in which said Tom Jackson is designated as President, the said Albrecht as Vice-President, and the said Cohen as Secretary and Treasurer, which business is that of the defendants, or some of them, and that said Lamson Bros Limited, with its sister defendants, been actively associated on one of the contractors for the purpose of competing the trade particularly and jointly."

The bill further alleges that the defendants have not ceased their interfer and unfair conduct but that they are continuing to pursue a course of conduct similar to that heretofore

set forth.

The bill further alleges as follows:

"That the said William Abrams, Jack W. Cohen, Louis Isaacson, Ben Isaacson and Robert Bloom and said Metalcrafts Corporation are not of great financial means and that a judgment against them for the large sums of money which would be justified if the conduct of which your orator heretofore complained, is continued unrestrained by the order of this court, and by reason thereof the unlawful, malicious and wilful purpose of said defendants is carried out, to the extent that your orator's damages would amount to a large sum of money, would not be collectible against them."

The bill further alleges that the complainant is suffering and will suffer irreparable damage and injury on account of the acts complained of.

The only question to be determined is whether the bill states a cause of action in equity.

The subjects to which the bill relates are (1) conspiracy, (2) slander, and (3) attempting to entice employees to leave their employment. It is obvious that none of these subjects comes within the special province of a court of equity. In other words, equity has no exclusive jurisdiction of the subjects to which the bill relates. The only possible ground on which equity jurisdiction could be maintained would be that the remedy at law is inadequate. To assume jurisdiction on that ground, it is manifest that the bill must allege facts which show a cause of action at law. Lime & Cement Co. v. Citizens Bank of St. Louis, 158 Mo. 272, 279. After alleging a cause of action at law, the bill further must state facts and circumstances which, according to the well established rules of equity, would justify the interposition of a court of equity on the ground that the remedy at law is inadequate. 21 Corpus Juris, section 14, pp. 39, 40.

The gist of the bill is that the defendants entered into a conspiracy to injure and to ruin the business of the complainant by making false and slanderous statements in regard to the complain-

set forth.

The bill further allows to defendant:

"that the only building owned, that is, claimed, during Lessee-ship, by Lessees was rented land and had a total value determin-ing, for the large sum of money which would be justified if the contract of which your orator complained, by reason of the misrepresentations made by the owner of title court, and by reason that the building, buildings and which purpose of said defendant is alleged and, to the extent that your orator's damages would amount to a large sum of money, will not be satisfied against them."

The bill further alleges that the complainant is suf-fering and will suffer irreparable damage and injury on account of the acts complained of.

The only question to be determined is whether the bill states a cause of action in equity.

The subjects to which the bill refers are (1) com-pulsory, (2) elective, and (3) attempting to entice employees to leave their employment. It is obvious that none of these subjects come within the special province of a court of equity. In other words, equity has no exclusive jurisdiction of the subjects to which the bill relates. The only possible ground on which equity jurisdiction could be maintained would be that the remedy at law is inadequate. In assume jurisdiction on that ground, it is manifest that the bill must allege facts which show a right at action at law. Lake v. Cooper Co. v. Gill Lake Bank of Ill., 1 Ill. 180 Ro. 179, 184.

After alleging a cause of action at law, the bill further must state facts and circumstances which, according to the well established rules of equity, would justify the intervention of a court of equity on the ground that the remedy at law is inadequate. 2 Bryant Pleas, section 1, p. 32, 33.

The gist of the bill is that the defendants entered into a conspiracy to injure and to ruin the business of the complainant by making false and slanderous statements in regard to the complain-

and its officers and employees in order to entice the employees to leave the employ of the complainant.

The rule is well settled that at common law in a civil action of conspiracy, the conspiracy of itself does not constitute a cause of action; that unless the conspirators commit wrongful acts which result in damage, no civil action will lie; that the gist of the cause of action is the damage and not the conspiracy. Doremus v. Hennessy, 176 Ill. 609, 614; Lasher v. Littell, 202 Ill. 551, 554; Duffy v. Frankenberg, 144 Ill. App. 103, 107; Martin v. Leslie, 93 Ill. App. 44, 45. The wrongful acts which were committed by the defendants pursuant to the conspiracy, according to the contention of counsel for the complainant, were slander and attempting to entice the employees of the complainant to leave the complainant. Counsel for the complainant recognize the rule that a court of equity will not grant relief for the commission of a slander; (Midland Press v. F. E. Compton Co., 204 Ill. App. 216, 217; 21 Corpus Juris, section 36, p. 59); and they do not rely on the slanderous statements as an independent, substantive ground for relief. They merely maintain that the slanderous statements may be considered as one of the means by which the defendants attempted to entice the employees of complainant to leave the complainant's employ. The only cause of action at law on which counsel for the complainant rely, and for which they contend that the remedy at law is so inadequate as to justify the interposition of a court of equity, is the attempt of the defendants to entice the employees of the complainant to leave complainant's employ.

We doubt extremely whether an attempt to entice employees from their employment constitutes a cause of action at law. But without deciding that question, and assuming for the sake of argument that an attempt to entice employees from their employment constitutes a cause of action at law, we are of the opinion that

the bill of complaint does not state a cause of action in equity. The only theory on which counsel for the complainant maintain that the bill states a cause of action in equity is that the allegations of the bill clearly show that the remedy at law is not adequate. If the allegations of the bill so show, then the contention of counsel for the complainant is correct. We think that for the completed wrongful acts it is clear that the remedy at law, if any, would be adequate. The general rule in this respect is that in cases of completed torts, damages at law usually constitute adequate redress. 21 Corpus Juris, section 36, p. 59. It is also the general rule that injunctive relief is preventive and is not granted to correct wrongs already perpetrated. Menard v. Hood, 68 Ill. 121, 122; Mead v. Cleland, 52 Ill. App. 294, 300; Commissioners of Highways v. Debce, 43 Ill. App., 25, 30; Midland Press v. F. E. Compton & Co., 204 Ill. App. 216, 217, (supra). The question whether the complainant will suffer irreparable damage if the defendants are not restrained from pursuing in the future a course of conduct similar to that pursued in the past, is the precise question to be determined. In considering this question it must be borne in mind that the injunction should not issue merely to allay the fears and apprehensions of the complainant, which may exist without any substantial foundation. 32 Corpus Juris, section 22, p. 42; Venner v. Chicago City Ry. Co., 258 Ill. 532, 550; Chicago Telephone Company v. Northwestern Telephone Co., 199 Ill., 324, 365, 366. There must be at least a probability of injury before an injunction should be granted. 32 Corpus Juris, section 22, p. 42. In the case of Vulcan Detinning Co. v. St. Clair, 318 Ill. 40, the court said (p. 44): "In order to entitle one to relief by injunction against unlawful interference with his business, positive and substantial injury must be shown."

In the case of Venner v. Chicago City Ry. Co., supra,

the will of complainant does not claim a cause of action in equity. The only theory on which consent for the complainant maintain that the will states a cause of action in equity is that the allegations of the bill disclosing does have the effect of law in our jurisprudence. If the allegations of the bill so show, then the protection of equity for the complainant is assured. We think that for the complained wrongful acts it is alone that are already so [illegible], it only would be adequate. The general rule in this country is that an injunction of equitable terms, because is not usually granted to restrain torts. 22 Corpus Juris, section 22, p. 22. It is also the general rule that injunctive relief is preventive and is not granted to correct wrongs already perpetrated. Beatty v. Ore. 64 Fed. 122, 123; Ford v. Chicago, 22 Fed. Apx. 194, 197; Ex-ministers of Finance v. Tobey, 42 Fed. Apx., 82, 20; Wallace Press v. E. E. Cowles & Co., 204 Fed. Apx. 224, 227, (Wash). The question whether the complainant will suffer irreparable damage if the defendants are not restrained from proceeding in the future a course of conduct similar to that pursued in the past, is the precise question to be determined. In considering this question it must be borne in mind that the injunction should not issue merely to allay the fears and apprehensions of the complainant, which may exist without any substantial foundation. 22 Corpus Juris, section 22, p. 22; Tucker v. Chicago City Ry., 209 Ill. 272, 22; Citizens Telephone Company v. Independent Telephone Co., 220 Ill., 220, 212, 224. There must be at least a probability of injury before an injunction should be granted. 22 Corpus Juris, section 22, p. 22. In the case of Pullman Terminals Co. v. Ill. Central, 224 Ill. 22, the court said (p. 22): "It never is enough one to relief by injunction against mistaken interpretation of his business, motives and substantial injury must be shown."

In the case of Tucker v. Chicago City Ry. Co., supra,

the court said (p. 350): "The act to be enjoined must be expected with reasonable certainty if not enjoined."

In the case of Oglesby Coal Co. v. Pasco, 79 Ill., 164, the court said (p. 172) that even if the complainant had in the past suffered injury, "it should appear to justify a court of equity in interfering by way of injunction, that the continuance of the injury is threatened and its danger imminent."

In the case of Barnard v. Commissioners of Highways, 172 Ill. 391, the court said (p. 394): "There are cases where a person threatened with an injury of the kind alleged here will not be required to wait, if he can demonstrate that the injury is reasonably certain to follow, but if that question is left in doubt and uncertainty the court should not interfere."

Assuming, as we have done for the sake of argument, that the bill of complaint states a cause of action at law, in respect of attempting to entice the complainant's employees to leave the employ of the complainant, we are of the opinion that the bill does not show that the complainant has not an adequate remedy at law. We do not think that from the allegations in the bill we may conclude with reasonable certainty that the defendants will damage irreparably the business of the complainant if the injunction should not be granted. The bill was filed October 1, 1926. According to the allegations of the bill the last wrongful act of the defendants specifically referred to occurred on September 17, 1926. In our opinion the allegations of the bill do not establish the fact that the complainant has suffered any positive substantial injury. The bill does not allege a single instance in which the defendants succeeded actually in enticing any of the employees to leave the employ of the complainant. And the matter of the attempted enticement, according to counsel for the complainant, is the essence of the bill. From the allegations of the bill it is

the court said (p. 380): "The act to be authorized must be supported with reasonable certainty if not majority."

In the case of [illegible] v. [illegible], 49 Ill., 164, the court said (p. 170) that even if the complainant had in the past suffered injury, "it would appear to justify a jury of equity in interfering by way of injunction, that the continuance of the injury is threatened and its legal remedies."

In the case of [illegible] v. [illegible] Corporation, 177 Ill. 387, the court said (p. 396): "There are cases where a person threatened with an injury of the kind alleged here will not be required to wait, if he can demonstrate that the injury is reasonably certain to follow, but if that possibility is left in doubt and uncertainty the result should not intervene."

Accordingly, as we have seen in the case of [illegible], that the Ill. of [illegible] state a cause of action at law, in respect of attempting to enjoin the constitutionality of [illegible] to leave the money of the complainant, we are of the opinion that the bill does not show that the complainant has not an adequate remedy at law. We do not take that from the allegations in the bill we may conclude with reasonable certainty that the defendants will damage irreparably the business of the complainant if the injunction should not be granted. The bill was filed October 2, 1924, according to the allegations of the bill the last warrants not of the defendants specifically referred to occurred on September 27, 1924. In our opinion the allegations of the bill do not establish the fact that the complainant has suffered any material substantial injury. The bill does not allege a single instance in which the defendants threatened actually to enforce any of the ordinances to leave the money of the complainant, and the notice of the attorney [illegible] complainant, according to the act for the complainant, is the cause of the bill. From the allegations of the bill it is

apparent that the efforts of the defendants in respect of enticement amounted only to unsuccessful attempts. Judging from the past acts of the defendants it must be presumed fairly and reasonably that in the future the defendants will be as unsuccessful in their attempts to entice the employees of the complainant to leave the complainant's employ as they have been in the past. The officers and employees of the complainant seem to be loyal to the complainant and unwilling to join the organization of the defendants. As we view the past acts of the defendants, they were principally of such a nature as to cause personal annoyance to the officers and employees of the complainant rather than to cause any substantial injury to the property rights of the complainant. In such case the general rule is that equity ordinarily will not interfere. 32 Corpus Juris, section 430, p. 272; White v. Fosfield, 212 Ill. App. 73, 76. Our conclusion is that the complainant can get complete relief for the past wrongful acts complained of and ample protection against their recurrence in the future by suits at law for conspiracy, slander and enticing employees to leave their employment, assuming for the sake of argument that the allegations of the bill state such causes of action at law.

In our view the allegations of the bill in regard to the insolvency of the defendants are not sufficiently definite and certain to render our conclusion in respect of the adequacy of the remedy at law unwarrantable.

We are of the opinion that the injunction should not have been granted. In reaching this conclusion we are not unmindful of the rule that the issuance of an interlocutory injunction rests in the sound discretion of the chancellor. High on Injunctions, vol. 2, section 1696, pp. 1643-46, (4th ed.)

In discussing the sufficiency of the bill of complaint so far we have considered the allegations of the bill in respect

of all the defendants jointly. We think, however, that the allegations in regard to the defendants Benjamin Lerman, doing business as the Glace Lamp & Shade Company, and the Metalcrafts Corporation are so utterly vague and inconclusive that an independent question is presented as to them; that irrespective of the question whether the injunction should have been issued against the other defendants, in no event should it have been issued against Lerman and the Metalcrafts Corporation.

For the reasons stated the decree of the Chancellor is reversed.

REVERSED.

McGurely, P. J., and Matchett, J., concur.

13 - 30898

HORTENCE ROSENBLATT, by SARAH ROSENBLATT, her mother and next friend, Plaintiffs in Error,	ERROR TO SUPERIOR COURT, COOK COUNTY.
v.	
ISADORE GLABMAN and MORRIS GLABMAN, doing business under the name of GLABMAN BROTHERS, Defendants in Error.	

Opinion filed March 2, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is a suit for damages for personal injuries alleged to have been caused by the negligent driving of a motor truck belonging to the defendants. About 5 P.M., June 19, 1918, Hortence Rosenblatt, a child nine years of age - who sues here through her mother, and who for convenience will be called the plaintiff - was playing a game called "German Spy" with some other children in the backyard of a house where she, the plaintiff, lived; and inthe course of the play, taking the part of the spy, she ran out into an alley - which ran east and west past the back of the lot on which they were playing, and, almost immediately, was struck by, or in some way fell against, the defendant's truck, which was being driven west in the alley, and was seriously injured, the tissues on the back of the left leg from just below the buttocks to near the junction of the upper and middle thirds of the leg being extensively torn away.

The case has been tried three times. What was done

HORTENCE ROSENBLATT, by
SARAH ROSENBLATT, her mother
and next friend,

Plaintiffs in Error,

ERROR TO

v.

SUPERIOR COURT,

COOK COUNTY.

ISADORE GLASSMAN and MORRIS
GLASSMAN, doing business under
the name of GLASSMAN BROTHERS,

Defendants in Error.

Opinion filed March 3, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is a suit for damages for personal injuries alleged to have been caused by the negligent driving of a motor truck belonging to the defendants. About 5 P.M., June 19, 1918, Hortence Rosenblatt, a child nine years of age - who sues here through her mother, and who for convenience will be called the plaintiff - was playing a game called "German Spy" with some other children in the backyard of a house where she, the plaintiff, lived; and in the course of the play, taking the part of the spy, she ran out into an alley - which ran east and west past the back of the lot on which they were playing, and, almost immediately, was struck by, or in some way fell against, the defendant's truck, which was being driven west in the alley, and was seriously injured, the tissues on the back of the left leg from just below the buttocks to near the junction of the upper and middle thirds of the leg being extensively torn away.

The case has been tried three times. What was done

in the first two is not disclosed. At the last trial, the one here for review, there was a verdict and judgment for the defendant.

For reversal, the principal contention for the plaintiff is that the verdict was clearly against the weight of the evidence. However, after careful consideration of all the evidence, we are impelled to the conclusion that we are not justified in overriding the verdict. It is true that there is testimony as to a somewhat excessive speed in the driving of the truck, especially considering that the alley was rough and uneven and only 15 feet wide - the truck itself being 7 feet wide - and that the plaintiff, a child of tender years, ran backwards and forwards in a zigzag way in front of the truck trying to save herself; still there is testimony for the defendants that no child ran across the alley in front of the truck; that the truck did not zigzag; that the truck was only going four or five miles an hour; that the first intimation they had that anything unusual had taken place was when they heard a knock against one of the wheels, and that they stopped the truck at once. Whose testimony should be believed? In such a case of conflict, to whom credit shall be given is a matter peculiarly apt for the jury; and they found for the defendants. Counsel for the plaintiff has endeavored to show certain discrepancies and inconsistencies in the evidence that suggest that the plaintiff was struck, by the truck, at a point in the alley some distance west of where she ran out, and that strong evidence of that fact is that her body was found lying along side of the front wheel of the truck. But such facts and others were in controversy, and the subject of conflicting testimony. As to where the plain-

in the first two is not disclosed. At the last trial, the one here for review, there was a verdict and judgment for the defendant.

For reversal, the principal contention for the plaintiff is that the verdict was clearly against the weight of the evidence. However, after careful consideration of all the evidence, we are impelled to the conclusion that we are not justified in overriding the verdict. It is true that there is testimony as to a somewhat excessive speed in the driving of the truck, especially considering that the alley was rough and uneven and only 16 feet wide - the truck itself being 7 feet wide - and that the plaintiff, a child of tender years, ran backwards and forwards in a zigzag way in front of the truck trying to save herself; still there is testimony for the defendants that no child ran across the alley in front of the truck; that the truck did not zigzag; that the truck was only going four or five miles an hour; that the first intimation they had that anything unusual had taken place was when they heard a knock against one of the wheels, and that they stopped the truck at once. Whose testimony should be believed? In such a case of conflict, to whom credit shall be given is a matter peculiarly apt for the jury; and they found for the defendants. Counsel for the plaintiff has endeavored to show certain discrepancies and inconsistencies in the evidence that suggest that the plaintiff was struck, by the truck, at a point in the alley some distance west of where she ran out, and that among evidence of that fact is that her body was found lying along side of the front wheel of the truck. But such facts and others were in controversy, and the subject of conflicting testimony. As to where the plain-

tiff was when struck, the defendant Isadore Glabman and his associates both testified that she was found lying along side of the rear wheel. There were several conflicts of fact, and the jury evidently did not credit the story of the plaintiff and her witnesses.

There is still such an occurrence as a pure accident, where no participant is legally liable in tort. The jury may have concluded that this was such a case, or it may have concluded that the defendants were not guilty of any negligence, or that the plaintiff was guilty of contributory negligence. Whatever the source of their final judgment, however, we do not feel warranted in holding contrary to their verdict.

It is contended for the plaintiff that error was committed in giving for the plaintiff instruction numbered 13. That instruction is as follows:

> "The court instructs you that one of the defenses relied upon by the defendants in this case is that of contributory negligence on the part of the plaintiff, Hortense Rosenblatt.
> 'Contributory negligence' as applied to this case means a failure on the part of Hortense Rosenblatt to exercise such care for her own safety as a child of her age, intelligence, capacity, discretion and experience would have exercised under the same circumstances, which failure proximately contributed to bring about the injury complained of.
> 'Proximately' as used in these instructions means so closely connected with the injury, that, but for the contributory negligence, the injury would not have happened.
> Unless Hortense Rosenblatt has proved by a preponderance or greater weight of the evidence that she was not guilty of contributory negligence as herein defined, then you must find the defendants not guilty."

A quite similar instruction was given in Johnson v. Gustafson, 233 Ill. App. 216, and it was held to be good. The argument that although the plaintiff was required to

tiff was when struck, the defendant Isadore Gladman and his associates both testified that she was found lying along side of the rear wheel. There were several conflicts of fact, and the jury evidently did not credit the story of the plaintiff and her witnesses.

There is still such an occurrence as a pure accident, where no participant is legally liable in tort. The jury may have concluded that this was such a case, or it may have concluded that the defendants were not guilty of any negligence, or that the plaintiff was guilty of contributory negligence. Whatever the source of their final judgment, however, we do not feel warranted in holding contrary to their verdict.

It is contended for the plaintiff that error was committed in giving for the plaintiff instruction numbered 18. That instruction is as follows:

"The court instructs you that one of the defenses relied upon by the defendants in this case is that of contributory negligence on the part of the plaintiff, Hortense Rosenblatt.
'Contributory negligence' as applied to this case means a failure on the part of Hortense Rosenblatt to exercise such care for her own safety as a child of her age, intelligence, capacity, discretion and experience would have exercised under the same circumstances, which failure proximately contributed to bring about the injury complained of.
'Proximately' as used in these instructions means so closely connected with the injury, that, but for the contributory negligence, the injury would not have happened.
Unless Hortense Rosenblatt has proved by a preponderance or greater weight of the evidence that she was not guilty of contributory negligence as herein defined, then you must find the defendants not guilty."

A quite similar instruction was given in Johnson v. Gustafson, 232 Ill. App. 218, and it was held to be good. The argument that although the plaintiff was required to

prove affirmatively that, at the time in question, she was in the exercise of ordinary care for her own safety, she was not bound to prove that she was not guilty of contributory negligence, is not sound; and the reason is that proof of the exercise of ordinary care is the equivalent of proof that she was not guilty of contributory negligence.

Objection is made to defendants instruction numbered nine; that the words, "from the evidence," which were used in the first sentence of the instruction, should have been repeated in the second sentence. Reading the instruction as a whole, it is quite obvious it has reference to a belief based on the evidence. Coulter v. I. C. R. R. Co., 264 Ill. 414, 423.

Finding no substantial error in the proceedings at the last trial, we are bound, even though the plaintiff has suffered an unfortunate and irremediable injury, to affirm the judgment. The judgment will be affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

prove affirmatively that, at the time in question, she was in the exercise of ordinary care for her own safety, she was not bound to prove that she was not guilty of contributory negligence, in not sound; and the rule is that proof of the exercise of ordinary care is the evidence of proof that she was not guilty of contributory negligence.

Objection is made to defendants instruction numbered nine; that the words, "from the evidence," which are used in the first sentence of the instruction, should have been repeated in the second sentence. Reading the instruction as a whole, it is quite obvious to the reader to a belief based on the evidence. Dwight v. C. & R. R. R. Co., 106 Ill. 414, 424.

Finding no substantial error in the proceedings at the last trial, we are bound, even though the plaintiff has suffered an unfortunate and irremediable injury, to affirm the judgment. The judgment will be affirmed.

AFFIRMED.

O'CONNOR, J., ABE DUNCAN, J., dissenting.

282 - 31102

EDYTHE DICK, Appellee, v. ALBERT DICK, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

Opinion filed March 2, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is a suit, in the Superior Court, by the plaintiff, Edythe Louise Dick, against her father-in-law, Albert Dick, defendant, for damages for the alienation of her husband's affections. There was a trial before the court, with a jury, and a verdict and judgment, in favor of the plaintiff and against the defendant, in the sum of $5,000.00. This appeal is from that judgment.

The plaintiff, Edythe Louise Dick, and Willis Dick were married in Des Moines, Iowa, on September 27, 1919. Prior to her marriage to Dick, she was married to George P. Jackson, from whom she was divorced on September 12, 1917. She was about twenty-one years of age when she married Jackson, and about twenty-nine years of age at the time of the trial. Willis Dick, also, had been married before he married the plaintiff. The plaintiff first met her father-in-law, the defendant, Albert Dick, and his family, at Quincy, Illinois, on her wedding trip. She and her husband, at that time, spent several weeks with the defendant and his wife. Shortly afterwards, on or about

EDYTHE DICK,		
	Appellee,	
		APPEAL FROM
	V.	SUPERIOR COURT,
ALBERT DICK,		COOK COUNTY.
	Appellant.	

Opinion filed March 3, 1927.

MR. PRESIDING JUSTICE DAVIS delivered the opinion of the court.

This is a suit, in the Superior Court, by the plaintiff, Edythe Louise Dick, against her father-in-law, Albert Dick, defendant, for damages for the alienation of her husband's affections. There was a trial before the court, with a jury, and a verdict and judgment, in favor of the plaintiff and against the defendant, in the sum of $5,000.00. This appeal is from that judgment.

The plaintiff, Edythe Louise Dick, and Willis Dick were married in Des Moines, Iowa, on September 27, 1914. Prior to her marriage to Dick, she was married to George F. Jackson, from whom she was divorced on September 18, 1917. She was about twenty-one years of age when she married Jackson, and about twenty-nine years of age at the time of the trial. Willis Dick, also, had been married before he married the plaintiff. The plaintiff first met her father-in-law, the defendant, Albert Dick, and his family, at Quincy, Illinois, in her wedding trip. She and her husband, at that time, spent several weeks with the defendant and his wife. Shortly afterwards, on or about

March 20, 1920, the plaintiff and her husband took over and conducted a candy store in Chicago. The defendant, at the solicitation of the plaintiff and her husband, signed two promissory notes, aggregating $11,500.00, which notes were also signed by the plaintiff and her husband, in order to purchase the candy store. In the end the notes were paid by the defendant. The plaintiff worked in the store off and on for a year or more, until some time in 1922. During 1923 and 1924 her husband took charge of the store. In 1923, the plaintiff made a trip to Bismarck, and was gone some time. When she came back she again lived with her husband, at the Willrae Hotel, Chicago. On January 23, 1924, she filed a bill of complaint for divorce in the Superior Court, on the ground of cruelty. The acts of cruelty were alleged to have taken place on December 15, 1922, February 13, 1923, August 1, 1923, and January 5, 1924. The instant case was begun on January 26, 1924. On June 21, 1924, she gave birth to a child. During the latter part of January 1924 and from then to January 16, 1925, she and her husband lived together. On February 1, 1925, the bill for divorce just mentioned was dismissed. On February 13, 1925, she filed a second bill for divorce against her husband, and in April, 1925, obtained a decree of divorce on the ground of cruelty. The decree recites the acts of cruelty as having taken place on December 15, 1922, February 13, 1923, August 15 and December 25, 1924.

The declaration consists of four counts; they charge, substantially, that the defendant wrongfully induced her husband to desert and live apart from her, and as a result,

March 10, 1920, the plaintiff and her husband took over and conducted a candy store in Chicago. The defendant, at the solicitation of the plaintiff and her husband, signed two promissory notes, aggregating $11,800.00, which notes were also signed by the plaintiff and her husband, in order to purchase the candy store. In the end the notes were paid by the defendant. The plaintiff worked in the store off and on for a year or more, until some time in 1922. During 1922 and 1924 her husband took charge of the store. In 1922, the plaintiff made a trip to Missouri, and was gone some time. When she came back she again lived with her husband, at the Willard Hotel, Chicago. On January 22, 1924, she filed a bill of complaint for divorce in the Superior Court, on the ground of cruelty. The acts of cruelty were alleged to have taken place on December 15, 1922, February 12, 1923, August 1, 1923, and January 5, 1924. The instant case was begun on January 22, 1924. On June 21, 1924, she gave birth to a child. During the latter part of January 1924 and from then to January 16, 1922, she and her husband lived together. On February 1, 1922, the bill for divorce just mentioned was dismissed. On February 12, 1922, she filed a second bill for divorce against her husband, and in April, 1922, obtained a decree of divorce on the ground of cruelty. The decree recites the acts of cruelty as having taken place on December 15, 1922, February 12, 1923, August 12 and December 22, 1924.

The declaration consists of four counts; they charge, substantially, that the defendant wrongfully induced her husband to desert and live apart from her, and as a result,

alienated and destroyed her husband's affections for her, so that she was lost and been deprived of her husband's society, and his assistance in her domestic affairs. The declaration sets forth that the misconduct constituting the tort charged, occurred on January 1, 1921, and on divers days subsequent thereto, prior to the beginning of this suit.

For reversal of the judgment, the chief contention of the defendant is that the trial judge erred in ruling upon certain matters of evidence. In the view we take of the case, this contention is well founded. No brief has been filed on behalf of the plaintiff. The brief for the defendant enumerates fifty-two, so-called, points. Inasmuch, however, as the judgment must be reversed and the cause remanded for a new trial, owing to the errors mentioned, it becomes unnecessary to set forth the evidence in detail, and we shall limit this opinion merely to a consideration of some of the contests which arise concerning the admissibility and rejection of evidence.

The evidence introduced on behalf of the plaintiff to make out her alleged cause of action, before resting, consists of her testimony, which covers nearly 300 pages in the record, and certain exhibits, made up chiefly of letters written by the defendant to his son, the plaintiff's husband.

On re-direct examination, the plaintiff was asked why she ceased working continuously in the store, and she answered, "Because my husband * * * said, 'Now, my father does not want you to work in this store, and you are going to get out, and you are going to stay out.'" In Fox v. Fuchs,

alienated and destroyed her husband's affections for her, so that she has lost and been deprived of her husband's society, and his assistance in her domestic affairs. The declaration sets forth that the misconduct constituting the tort charged occurred on January 1, 1928, and on divers days subsequent thereto, prior to the beginning of this suit.

For reversal of the judgment, the chief contention of the defendant is that the trial judge erred in ruling upon certain matters of evidence. In the view we take of the case, this contention is well founded. No brief has been filed on behalf of the plaintiff. The brief for the defendant enumerates fifty-two so-called points. Inasmuch, however, as the judgment must be reversed and the cause remanded for a new trial, owing to the error mentioned, it becomes unnecessary to set forth the evidence in detail, and we shall limit this opinion merely to a consideration of some of the contents which arise concerning the admissibility and rejection of evidence.

The evidence introduced on behalf of the plaintiff to make out her alleged cause of action, before resting, consists of her testimony, which covers nearly 300 pages in the record, and certain exhibits, made up chiefly of letters written by the defendant to his son, the plaintiff's husband.

On re-direct examination, the plaintiff was asked why she ceased writing periodically in the store, and she answered, "because my husband * * * said, 'Ma, my father does not want you to work in this store, and you are going to get out, and you are going to stay out.'" In Lee v. Fisch,

241 Ill. App. 242, this court, after analyzing the decisions on the subject, used the following language, "It follows that the rule of the common law still applies to any admissions or conversations of the other, and that such admissions and conversations are not authorized or permitted by the statute 'except in suits or causes between such husband and wife.'" Sec. 5, Chap. 51, Cahill's Rev. Stats. 1935. It follows that the testimony above referred to was incompetent and inadmissible.

The plaintiff was asked, on direct examination, what, if anything, her husband said to her at or about the dates of certain letters which had been received by her in September, 1921, and she answered that her husband said, "I feel exactly as my father does about this situation. You are positively no good; I believe exactly what he has said to me. I want you to get out of the house. I don't want anything more to do with you." She was further asked on direct examination, whether she had any conversation with her husband about December 7, 1921, indicative of his feelings toward her, and she answered that her husband said, "I am going to do as my father said; I am going to be firm with you, and I am going to be the cock of the walk." Those questions and answers, under the ruling of this court in the Fox case (supra), were incompetent.

When the plaintiff was asked whether in the first year of their married life her husband told her anything about his attitude towards her, she was allowed, over defendant's objection, to answer as follows: "He said I was a very loving wife and considered me all a wife should be, a

241 Ill. App. 248, this court, after analyzing the decisions on the subject, made the following language, "It follows that the rule of the common law still applies to any admissions or conversations of the other, and that such admissions and conversations are not authorized or permitted by the statute except in suits or actions between such husband and wife." Sec. 5, Chap. 41, Smith's Rev. Stats. 1955. It follows that the testimony above referred to was incompetent and inadmissible.

The plaintiff was asked, on direct examination, what, if anything, her husband said to her at or about the dates of certain letters which had been received by her in December, 1951, and she answered that her husband said, "I feel exactly as my father does about this situation. You are positively no good; I believe exactly what he has said to me. I want you to get out of the house. I don't want anything more to do with you." She was further asked on direct examination, whether she had any conversation with her husband about December 7, 1951, indicative of his feelings toward her, and she answered that her husband said, "I am going to do as my father said; I am going to be firm with you, and I am going to be the cook of the well." These questions and answers, under the ruling of this court in the Fox case (supra), were incompetent.

When the plaintiff was asked whether in the first year of their married life her husband told her anything about his attitude towards her, she was allowed, over defendant's objection, to answer as follows; "He said I was a very loving wife and considered me all a wife should be, a

loving companion. He said a great many things. In September, 1921, he was extremely critical and his attitude toward me had changed. In September, 1921, he took me by the hands and twisted them and said, 'you will sign these notes.' He referred to the notes we had signed in taking over the business. He said my father knows the type of girl you are, and I believe him." That was objectionable for the reasons we have already stated.

A series of letters written by the defendant to the plaintiff's husband, which were surreptitiously gotten by her from her husband's possession, were introduced in evidence by the plaintiff, and it is contended for the defendant that, having been obtained without her husband's consent or knowledge, they were inadmissible. Where evidence has been obtained by violating the law, as, for example, invading the privacy of a home, without a search warrant, it has been held that the evidence may be suppressed. Where, however, as here, the letters were sent to and were in the possession of her husband, and they were not obtained by duress, or fraud, other than being taken without his knowledge, we feel bound to hold, particularly as they were offered in evidence, not against her husband, but against the defendant, that they were competent for what they were worth.

It is contended for the defendant that at the close of the plaintiff's evidence, or at the close of all the evidence, the court should have instructed the jury to find for the defendant. There is a large volume of evidence, and an examination of it does show some evidence tending to prove the cause of action alleged, and that being the situation, under the law, the evidence had to be submitted to the jury.

loving companion. He said a great many things. In September, 1921, he was extremely critical and his attitude toward me had changed. In September, 1921, he took me by the hands and twisted them and said, 'you will sign these notes.' He referred to the notes we had signed in taking over the business. He said my father knows the type of girl you are, and I believe him.' That was objectionable for the reasons we have already stated.

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It is contended for the defendant that at the close of the plaintiff's evidence, or at the close of all the evidence, the court should have instructed the jury to find for the defendant. There is a large volume of evidence, and an examination of it does show some evidence tending to prove the cause of action alleged, and that being the situation, under the law, the evidence had to be submitted to the jury.

Substantial error having been committed, particularly in permitting the plaintiff to testify to conversations with, and admissions by her husband, we are of the opinion, as stated above, that there ought to be a new trial. We refrain from passing upon the question whether the verdict was clearly against the weight of the evidence; for, even if we were of the opinion that it was, it would still be necessary, under the law, to remand the cause for a new trial. Mirich v. Forschner Contracting Co., 312 Ill. 343.

Likewise, as to the instructions. At another trial the evidence will be different, and so may give rise to different instructions.

For the reasons given, the judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

O'CONNOR, J. CONCURS;
THOMSON, J. SPECIALLY CONCURRING:

I concur in the foregoing decision, but in my opinion the fact that there may be different evidence presented on the re-trial of the case, does not mean that the instructions submitted and given will necessarily be different. To avoid possible error on the re-trial, it should be pointed out that the third and fifth instructions, as given, were clearly erroneous and would be so, no matter what the evidence is.

Substantial error having been committed, particularly in permitting the plaintiff to testify to conversations with, and admissions by her husband, we are of the opinion, as stated above, that there ought to be a new trial. We refrain from passing upon the question whether the verdict was clearly against the weight of the evidence; for, even if we were of the opinion that it was, it would still be necessary, under the law, to remand the cause for a new trial. Wright v. Northwestern R.R., 2 N.D. 111, 113.

Likewise, as to the instructions. At another trial the evidence will be different, and as may give rise to different instructions.

For the reasons given, the judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

BURKE, J. (CONCURRING):

I concur in the foregoing decision, but in my opinion the fact that there may be different evidence presented on the re-trial of the case, does not mean that the instructions submitted not given will necessarily be different. To avoid possible error on the re-trial, it should be pointed out that the third and fifth instructions, as given, were clearly erroneous and would be so, no matter what the evidence is.

291-31111

JULIUS KLOSE, APPELLEE, vs. CHARLOTTE HAAG, APPELLANT.	APPEAL FROM CIRCUIT COURT COOK COUNTY.

Opinion filed March 2, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On March 14, 1924, a judgment by confession, in the sum of $1,266.75 - being $1,000.00 principal, $216.75 interest, and $50.00 attorney's fees - was entered, in the Circuit Court, in favor of the plaintiff, Julius Klose, and against the defendant, Charlotte Haag, on a promissory note, which was signed by the defendant, and payable to the plaintiff.

About a year later, on March 9, 1925, an execution was issued, and on March 13, 1925, returned, showing service, demand, and no property found, and no part satisfied.

On March 27, 1925, an order was entered based on a motion of the defendant, supported by affidavit, that the judgment by confession of March 14, 1924, be opened and the defendant given leave to plead, the judgment meanwhile to stand as security. The defendant pleaded that she had paid the note in full. She, also, filed an affidavit of merits.

JULIUS KLOSE,	
APPELLEE,	APPEAL FROM
	CIRCUIT COURT
vs.	COOK COUNTY.
CHARLOTTE HAAG,	
APPELLANT.	

Opinion filed March 3, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On March 14, 1924, a judgment by confession, in the sum of $1,386.75 - being $1,000.00 principal, $186.75 interest, and $50.00 attorney's fees - was entered, in the Circuit Court, in favor of the plaintiff, Julius Klose, and against the defendant, Charlotte Haag, on a promissory note, which was signed by the defendant, and payable to the plaintiff.

About a year later, on March 3, 1925, an execution was issued, and on March 13, 1925, returned, showing service, demand, and no property found, and no part satisfied.

On March 27, 1925, an order was entered based on a motion of the defendant, supported by affidavit, that the judgment by confession of March 14, 1924, be opened and the defendant given leave to plead, the judgment meanwhile to stand as security. The defendant pleaded that she had paid the note in full. She, also, filed an affidavit of merits,

Therein she alleged (1) that at the time of the execution of the note, the plaintiff told her she would not be required to pay any interest on it; (2) that for a period of about three years, just prior to September 17, 1920, the plaintiff lived at her home, and was furnished by her with board, clothing, tobacco and incidentals; (3) that when he first lived with her, he paid $8.00 a week for his board, room and services, and continued to do so until September 17, 1920; (4) that on that date it was agreed that he should pay $15.00 a week, in the future, as far as he was able, and that whatever of that amount he was not able to pay, should be credited on the $1,000.00 note; (5) that between September, 1920 and December 31, 1923, at $15.00 a week, $2,580.00 became due the defendant, of which amount, the plaintiff paid $1473.00, leaving a balance due of $1107.00; and (6) that that balance, when applied on the note of $1,000.00, left due her, the defendant, $107.00. There was a jury trial, and, on November 18, 1925, a verdict for the plaintiff for $1,000.00, and $50.00 attorney's fees. On November 20, 1925, a motion by the defendant for a new trial was granted. There was a second jury trial, and on January 9, 1926, a verdict for the plaintiff for $1,000.00, without interest, "plus fees." At the second trial, three interrogatories were given to the jury, and answered by them.

(1) Did the plaintiff and defendant make an agreement on or about the 17th day of September, 1920, wherein and whereby it was agreed between them that plaintiff was to pay to defendant $15.00 per week for board and that plaintiff would pay to defendant such moneys as he could, and the difference between the amount of money paid by plaintiff to defendant and $15.00 per week was to be applied in payment of the note sued on.

Therein she alleged (1) that at the time of the execution of the note, the plaintiff told her she would not be required to pay any interest on it; (2) that for a period of about three years, just prior to September 17, 1920, the plaintiff lived at her home, and was furnished by her with board, clothing, tobacco and incidentals; (3) that when he first lived with her, he paid $8.00 a week for his board, room and services, and continued to do so until September 17, 1920; (4) that on that date it was agreed that he should pay $15.00 a week, in the future, as far as he was able, and that whatever of that amount he was not able to pay, should be credited on the $1,000.00 note; (5) that between September, 1920 and December 31, 1923, at $15.00 a week, $2,580.00 became due the defendant, of which amount, the plaintiff paid $1475.00, leaving a balance due of $1107.00; and (6) that that balance, when applied on the note of $1,000.00, left due her, the defendant, $107.00. There was a jury trial, and, on November 18, 1925, a verdict for the plaintiff for $1,000.00, and $30.00 attorney's fees. On November 20, 1925, a motion by the defendant for a new trial was granted. There was a second jury trial, and on January 9, 1926, a verdict for the plaintiff for $1,000.00, without interest, "plus fees." At the second trial, three interrogatories were given to the jury, and answered by them.

(1) Did the plaintiff and defendant make an agreement on or about the 17th day of September, 1920, wherein and whereby it was agreed between them that plaintiff was to pay to defendant $15.00 per week for board and that plaintiff would pay to defendant such moneys as he could, and the difference between the amount of money paid by plaintiff to defendant and $15.00 per week was to be applied in payment of the note sued on.

This they answered in the negative.

(2) Did the plaintiff board with the defendant from about September 17, 1920, to about January 3, 1924. This, they answered in the affirmative.

(3) Did plaintiff and defendant, on or about the 3rd day of January, 1924, arrive at an account stated. This, they answered in the negative.

Motions for a new trial and in arrest of judgment were made and overruled, and judgment was entered that as to the amount of $1,000.00, the former judgment stand. This appeal is therefrom.

For reversal, the chief contentions are that the verdict was clearly against the manifest weight of the evidence; that errors were committed in ruling upon matters of evidence; and that error was committed in regard to certain instructions.

Was the verdict manifestly against the weight of the evidence? Sometime in the year 1916, the plaintiff, a man, at that time, about 82 years old, went to board and lodge at 1927 School Street, with the defendant. In making arrangements as to board and lodging, the plaintiff, according to his testimony, said to the defendant, "I got an income of $540.00 a year. If you be satisfied with the money, I give to you $540.00 a year." The defendant testified that he promised her the interest on $9,000.00, which he had, being $540.00 a year. Following their understanding, the plaintiff boarded with the defendant at the house on School Street until the defendant, in September, 1920, moved to 3711 Palmer Street, and lived with her at the latter place until January, 1924, when he left. The defendant testified that during the time he boarded with her on School Street, she received about $8.00 a week. On July 16, 1920, or a few days

This they answered in the negative.

(2) Did the plaintiff board with the defendant from about September 17, 1920, to about January 3, 1924. This, they answered in the affirmative.

(3) Did plaintiff and defendant, on or about the 3rd day of January, 1924, arrive at an account stated. This, they answered in the negative.

Motions for a new trial and in arrest of judgment were made and overruled, and judgment was entered that as to the amount of $1,000.00, the former judgment stand. This appeal is therefrom.

For reversal, the chief contentions are that the verdict was clearly against the manifest weight of the evidence; that errors were committed in ruling upon matters of evidence; and that error was committed in regard to certain instructions.

Was the verdict manifestly against the weight of the evidence? Sometime in the year 1918, the plaintiff, a man, at that time, about 82 years old, went to board and lodge at 1827 School Street, with the defendant. In making arrangements as to board and lodging, the plaintiff, according to his testimony, said to the defendant, "I get an income of $540.00 a year. If you be satisfied with the money, I give to you $540.00 a year." The defendant testified that he promised her the interest on $9,000.00, which he had, being $540.00 a year. Following their understanding, the plaintiff boarded with the defendant at the house on School Street until the defendant, in September, 1920, moved to 2711 Palmer Street, and lived with her at the latter place until January, 1924, when he left. The defendant testified that during the time he boarded with her on School Street, she received about $3.00 a week. On July 18, 1920, or a few days

prior thereto, she, the defendant, according to her testimony, borrowed $1,000.00 from him, the plaintiff, and gave him the note here in suit. The note is dated July 16, 1920, payable to Julius Klose, with interest at 6% per annum, and contains a warrant of attorney. She testified that she borrowed the $1,000.00 from the plaintiff, and without interest.

On September 17, 1920, according to the defendant, she had two conversations with the plaintiff. She says she told him in the morning that she could not keep him for $8.00 a week; that he said he would not pay more than $8.00 or $9.00 a week; and that he was going to look for a place, and in the evening came back and said that he could not find a place; that they talked about expenses; that she did not receive all the interest that was promised; that she wanted $15.00 a week; that he said he would pay it, but as he did not have enough money, the difference between what he could pay and $15.00 a week, should come off the note. On the other hand, the plaintiff denied that she told him that she could not keep him any longer for the amount of money he was paying. The plaintiff testified that he loaned the defendant $1400.00, and that it was evidenced by a check, dated July 2, 1920, for $1400.00. A check for $1400.00 was offered in evidence. It was for $1400.00, dated July 2, 1920, signed by Paul Schulte, payable to the order of the plaintiff, and endorsed Julius Klose and P. Manes. P. Manes was defendant's son-in-law. Across the face of the check were the words, "J. M. Durgee, Cashier." The plaintiff testified that he got the check from Schulte, and gave it to the defendant to buy a house with. It was admitted by the defendant, that in addition to receiving $8.00 a week, she was having the use of $1,000.00, without interest. Her testimony as to whether, in

prior thereto, she, the defendant, according to her testimony, borrowed $1,000.00 from him, the plaintiff, and gave him the note here in suit. The note is dated July 16, 1920, payable to Julina Klose, with interest at 8% per annum, and contains a warrant of attorney. She testified that she borrowed the $1,000.00 from the plaintiff, and without interest.

On September 17, 1920, according to the defendant, she had two conversations with the plaintiff. She says she told him in the morning that she could not keep him for $8.00 a week; that he said he would not pay more than $8.00 or $9.00 a week; and that he was going to look for a place, and in the evening came back and said that he could not find a place; that they talked about expenses; that she did not receive all the interest that was promised; that she wanted $15.00 a week; that he said he would pay it, but as he did not have enough money, the difference between what he could pay and $15.00 a week, should come off the note. On the other hand, the plaintiff denied that she told him that she could not keep him any longer for the amount of money he was paying. The plaintiff testified that he loaned the defendant $1400.00, and that it was evidenced by a check, dated July 3, 1920, for $1400.00. A check for $1400.00 was offered in evidence. It was for $1400.00, dated July 3, 1920, signed by Paul Schulte, payable to the order of the plaintiff, and endorsed Julina Klose and P. Manse. P. Manse was defendant's son-in-law. Across the face of the check were the words, "J. M. Burgee, Cashier." The plaintiff testified that he got the check from Schulte, and gave it to the defendant to buy a house with. It was admitted by the defendant, that in addition to receiving $8100 a week, she was having the use of $1,000.00, without interest. Her testimony as to whether, in

July, 1920, she was paid $1,000.00 or $1400.00, is somewhat confusing; at first she said she did not see the check, and later, that she did not remember. In January, 1924, the plaintiff left, and stopped boarding with the defendant. He testified that when he left in January, she told him to call in March for his money; that she had a $2,000.00 mortgage, and if she got the money she would pay him; that on March 1, 1924, he called for the $1400.00, and she told him that the man who owed the mortgage had called, but as he had no money, she could not pay him the plaintiff. The defendant denied that she told him to call in March, or that he was there in March, but admitted that she had a mortgage for $2,000.00, and that the plaintiff knew of it. She testified that when he left in January, 1924, she told him he owed her $1,107.00; and that he said he would give her back the $1,000.00 note.

As to the claim of the defendant that the plaintiff agreed to pay $15.00 a week, her daughter testified that she heard the plaintiff, in September, 1920, tell her mother that he would pay $15.00 a week; and a son of the defendant, Paul, testified that in July, 1924, he heard his mother ask the plaintiff about the note, and that the defendant said, he did not hage it with him, but would bring it in a few days, and that as to the $107.00, he would settle that later on.

From the foregoing recitation, it is obvious that, whether a promise was made, by the plaintiff, on September 17, 1920, to pay $15.00 a week for his board and lodging, depends very greatly, if not entirely, on the credence given the different witnesses, particularly, the plaintiff and the defendant. The check for $1400.00 is strong evidence that the defendant actually borrowed $1400.00. The plaintiff testified

July, 1920, she was paid $1,000.00 or $1400.00, is somewhat confusing; at first she said she did not see the check, and later, that she did not remember. In January, 1924, the plaintiff left, and stopped boarding with the defendant. He testified that when he left in January, she told him to call in March for his money; that she had a $3,000.00 mortgage, and if she got the money she would pay him; that on March 1, 1924, he called for the $1400.00, and she told him that the man who owed the mortgage had called, but as he had no money, she could not pay him the plaintiff. The defendant denied that she told him to call in March, or that he was there in March, but admitted that she had a mortgage for $3,000.00, and that the plaintiff knew of it. She testified that when he left in January, 1924, she told him he owed her $1,107.00; and that he said he would give her back the $1,000.00 note.

As to the claim of the defendant that the plaintiff agreed to pay $15.00 a week, her daughter testified that she heard the plaintiff, in September, 1920, tell her mother that he would pay $15.00 a week; and a son of the defendant, Paul, testified that in July, 1924, he heard his mother ask the plaintiff about the note, and that the defendant said, he did not have it with him, but would bring it in a few days, and that as to the $107.00, he would settle that later on.

From the foregoing recitation, it is obvious that, whether a promise was made, by the plaintiff, on September 17, 1920, to pay $15.00 a week for his board and lodging, depends very greatly, if not entirely, on the credence given the different witnesses, particularly, the plaintiff and the defendant. The check for $1400.00 is strong evidence that the defendant actually borrowed $1400.00. The plaintiff testified

he gave it to her and her testimony shows some vacillation, and is quite confusing. It is admitted by both sides that the $1,000 note was given, and that no interest was to be charged on it. The plaintiff claimed that in January, 1924, she told him to call in March for the money on the note, and that he did so, and that she said she could not pay him because her mortgage debtor was not able to pay her. That is denied by her. Of course, we have not had the witnesses before us, and so we are at a very great disadvantage. At the trial, the plea of the general issue was withdrawn, and counsel for the defendant stated that he stood on the plea of payment, and admitted that the burden of proof of payment was on the defendant. To the interrogatory of the defendant, was there an agreement for $15.00 a week, the jury answered, no. Bearing in mind the issue, upon whom was the burden of proof, the evidence, the finding of the jury; the fact that credence to be given the witnesses was of vital importance and that there have been two trials, resulting in like verdicts, we are of the opinion, notwithstanding many discrepancies in the evidence on both sides, that we are not justified in overriding the verdict of the jury.

It is contended that the court erred in admitting in evidence the check for $1400.00, which the plaintiff testified he gave to the defendant. That, in our judgment, is untenable. The plaintiff was entitled to state in detail, if he saw fit, what took place at and about the time that the $1,000.00 note was given by the defendant to him. If at, or about, that time he loaned or gave her a check for $1400.00, he had the right to say so, and produce and put in evidence the check. The fact that the defendant admitted the consider-

he gave it to her and her testimony shows some vacillation, and is quite confusing. It is admitted by both sides that the $1,000 note was given, and that no interest was to be charged on it. The plaintiff claimed that in January, 1924, she told him to call in March for the money on the note, and that he did so, and that she said she could not pay him because her mortgage debtor was not able to pay her. That is denied by her. Of course, we have not had the witnesses before us, and so we are at a very great disadvantage. At the trial, the plea of the general issue was withdrawn, and counsel for the defendant stated that he stood on the plea of payment, and admitted that the burden of proof of payment was on the defendant. To the interrogatory of the defendant, was there an agreement for $15.00 a week, the jury answered, no. Bearing in mind the issue, upon whom was the burden of proof, the evidence, the finding of the jury; the fact that credence to be given the witnesses was of vital importance and that there have been two trials, resulting in like verdicts, we are of the opinion, notwithstanding many discrepancies in the evidence on both sides, that we are not justified in overriding the verdict of the jury.

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ation for the $1,000.00 note, did not, per se, deprive the plaintiff of showing what constituted the transaction in question. Then, too, the defendant had testified, before the note was offered in evidence, that she asked the plaintiff for $1,000.00, and did not ask him for $1400.00, and when shown the check in question, testified somewhat vaguely about it. In reality, there were quite a number of reasons why the check was not only competent, but very important evidence. It was important, even, as bearing upon the defendant's credibility. The defendant undertook no explanation of the check, although it was endorsed not only by the plaintiff, but by P. Manes, the son-in-law of the defendant and Peter Manes was not called, although his wife was.

It is contended that, as the defendant, on February 25, 1924, sent a statement of account to the plaintiff, and it was received by the plaintiff and not seasonably objected to by him, it became an account stated. The evidence of the plaintiff shows, however, that a few days after the letter was sent, he came in from Whiting, where he was living, and visited the defendant, and told her that he had come, as she had asked him to do, for his money, and that in answer to his request, she told him that a man who owed her a certain mortgage, was then unable to pay her, and, therefore, she was unable to pay him, the plaintiff. That evidence prevents the inference that the plaintiff, by reason of not answering the defendant's statement, had sanctioned the written account.

It is contended that error was committed in regard to certain instructions. The abstract fails to show at whose instance or request any of the instructions was given,

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It is contended that, as the defendant, on February 22, 1924, sent a statement of account to the plaintiff, and it was received by the plaintiff and not unreasonably objected to by him, it became an account stated. The evidence of the plaintiff shows, however, that a few days after the letter was sent, he came in from working, where he was living, and visited the defendant, and told her that he had done, as she had asked him to do, for his money, and that in answer to his request, she told him that a man who owed her a certain mortgage, was then unable to pay her, and, therefore, she was unable to pay him, the plaintiff. That evidence prevents the inference that the plaintiff, by reason of not answering the defendant's statement, had acquiesced the written account.

It is contended that error was committed in refusal to certain instructions. The abstract fails to show at whose instance or request any of the instructions was given.

and the record is defective in the same way; nor does it show who submitted the instructions that were refused. The court said in Martin v. C. & M. Elec. R. R. Co., 220 Ill. 97.

> "It is important to know at whose request the instructions were given, in order that any alleged error in giving same may be properly considered. It is not the province of the court to resort to conjecture for the purpose of determining whether an instruction has been given at the request of appellants. * * * but it is the duty of the parties bringing the record to this court, to make the alleged errors clearly appear, the rule being that the bill of exceptions is their pleading, and must be taken most strongly against them." Boyd v. Schnell, 209 Ill. App. 187.

It is claimed by counsel for the defendant that in some way the plaintiff, while on the witness stand, was guilty of misconduct; apparently in answering questions. The plaintiff, at the time of the trial, was over ninety yearsof age. Counsel cite as illustrative of the plaintiff's misconduct, that when plaintiff's counsel asked him the question, "Did she (meaning the defendant) tell you that she could not keep you any longer for the amount of money you were paying?" the plaintiff answered, "No, she was satisfied to get what I gave her." Certainly there was nothing extraordinary about that answer; in fact, it was quite natural that the witness, presumably not having a knowledge of the rules of evidence, should answer the question in the negative, and then give the reason. Three or four other instances of alleged misconduct are called to our attention in the brief of counsel for the defendant, but in none of them do we find anything of substantial importance.

Finding no substantial error in the record, the judgment is affirmed. AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

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Finding no substantial error in the record, the judgment is affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

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PAUL ADAMITIS, Appellant, v. NELLIE McARDLE, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed March 2, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On February 13, 1925, a judgment by confession was entered in the Municipal Court of Chicago in favor of the plaintiff, Paul Adamitis and against the defendant, Nellie McArdle in the sum of $412.21, being a balance alleged to be due on a $1,000.00 note and $36.80, attorney's fees.

As a result of a motion and verified petition by the defendant, the court, on July 16, 1925, opened up the judgment, and gave the defendant leave to make a defense, the judgment to stand as security, and the petition to stand as an affidavit of merits.

There was a trial before the court without a jury, and on February 20, 1926, the original judgment was vacated and a judgment was entered in favor of the defendant. This appeal is from that judgment.

At the trial the plaintiff introduced the note in evidence, and rested. The note was for $1,000.00, dated February 27, 1922 and signed by the defendant. It was payable to the order of herself and due in 18 months from

PAUL ADAMITIS, Appellant, v. NELLIE MOURKIS, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed March 2, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On February 18, 1926, a judgment by confession was entered in the Municipal Court of Chicago in favor of the plaintiff, Paul Adamitis and against the defendant, Nellie Mourkis in the sum of $812.21, being a balance alleged to be due on a $1,000.00 note and $36.80, attorney's fees.

As a result of a motion and verified petition by the defendant, the court, on July 16, 1926, opened up the judgment, and gave the defendant leave to make a defense, the judgment to stand as security, and the petition to stand as an affidavit of merits.

There was a trial before the court without a jury, and on February 20, 1926, the original judgment was vacated and a judgment was entered in favor of the defendant. This appeal is from that judgment.

At the trial the plaintiff introduced the note in evidence, and rested. The note was for $1,000.00, dated February 27, 1922 and signed by the defendant. It was payable to the order of herself and due in 18 months from

its date. It was endorsed by her, and also, by M. Albert Iver. It recites that it was secured by a junior mortgage on certain real estate and was inferior to 18 other notes, aggregating $5,000.00. On the back were certain endorsements of payment leaving a balance due of $334.16. It is the theory of the defendant (1) that the note was paid; and (2) that she had a good defense against Iver, who had taken the note before maturity, and that the plaintiff (as she claimed) took the note after maturity, and, therefore, he was not entitled to recover. The plaintiff's theory is that he took it before maturity, and that it was not paid.

The defendant introduced in evidence, over plaintiff's objection, what purported to be a memorandum dated May 19, 1923, and signed by one N. Albert Iver. It stated that it was to certify that he agreed to give her for her interest in 4911-13 Calumet Avenue, her original investment and ten percent in cash including "all payment" on second mortgage note at any time within one year from date upon 90 days written notice.

Also, there was introduced in evidence over plaintiff's objection, a memorandum dated July 16, 1923, signed by N. Albert Iver and Nellie McArdle, the defendant. It stated that he agreed to purchase and she agreed to sell the Calumet Avenue property for the net sum of $4500.00; that he was to assume all mortgages and that if the contract was not closed in 30 days, it would be null and void.

She testified that she met Iver at his office and received the money which was promised. She further testified that she made the payments which were endorsed on the

its date. It was endorsed by her, and also, by M. Albert Iver. It recites that it was secured by a junior mortgage on certain real estate and was inferior to 18 other notes, aggregating $5,000.00. On the back were certain endorsements of payment leaving a balance due of $334.16. It is the theory of the defendant (1) that the note was paid; and (2) that she had a good defense against Iver, who had taken the note before maturity, and that the plaintiff (as she claimed) took the note after maturity, and, therefore, he was not entitled to recover. The plaintiff's theory is that he took it before maturity, and that it was not paid.

The defendant introduced in evidence, over plaintiff's objection, what purported to be a memorandum dated May 19, 1922, and signed by one M. Albert Iver. It stated that it was to certify that he agreed to give her for her interest in 4021-13 Delmont Avenue, her original investment and ten percent in cash including "all payment" on second mortgage note at any time within one year from date upon 30 days written notice.

Also, there was introduced in evidence over plaintiff's objection, a memorandum dated July 16, 1922, signed by M. Albert Iver and Nellie McArdle, the defendant. It stated that he agreed to purchase and she agreed to sell the Delmont Avenue property for the net sum of $4500.00; that he was to assume all mortgages and that if the contract was not closed in 30 days, it would be null and void.

She testified that she met Iver at his office and received the money which was promised. She further testified that she made the payments which were endorsed on the

back of the note; that Iver had the note there the last time, in June, 1923; that when the deal was closed, nothing was said about a further payment on the note; that her name was not in the telephone book and she did not suppose the plaintiff knew where she was. When asked as to what occurred at his office, when she received the purchase price, in regard to the note in question, she answered, "That was to go in, I had no conversation on that note." There was introduced in evidence, over the objection of the plaintiff, a warranty deed, dated August 8, 1923, from her to N. Albert Iver and Esther B. Iver as joint tenants.

One Marshall, an attorney, who was the trustee in the trust deed which secured, among others, the note in question, testified that, on February 9, 1925, the plaintiff called at his office and handed him the note, and asked him how it came about that he, the witness, had executed a release deed which the plaintiff had found, upon examination, on record; that he, the witness, said he would look the matter up and let him know; that he asked the plaintiffwhere he, the plaintiff, got the note, and the plaintiff replied he got it from Ivers a few months ago, this last summer (meaning 1924); that he, the witness, said, "You got it after maturity", and the plaintiff answered, "Yes"; that the other notes were all paid and cancelled.

There was introduced in evidence a letter dated February 11, 1925, from the attorneys of the plaintiff to the witness Marshall. It stated that the plaintiff was the holder of note 19, the one here in question; that it had been given to them to collect; that they found

book of the note; that Iver had the note there the last time, in June, 1888; that when the deal was closed, nothing was said about a further payment on the note; that her name was not in the telephone book and she did not suppose the plaintiff knew where she was. When asked as to what occurred at his office, when she received the purchase price, in regard to the note in question, she answered, "That was to go in, I had no conversation on that note." There was introduced in evidence, over the objection of the plaintiff, a warranty deed, dated August 8, 1888, from her to M. Albert Iver and Esther R. Iver as joint tenants.

One Marshall, an attorney, who was the trustee in the trust deed which secured, among others, the note in question, testified that, on February 9, 1888, the plaintiff called at his office and handed him the note, and asked him how it came about that he, the witness, had executed a release deed which the plaintiff had found, upon examination, on record; that he, the witness, said he would look the matter up and let him know; that he asked the plaintiff where he, the plaintiff, got the note, and the plaintiff replied he got it from Iverse a few months ago, this last summer (meaning 1884); that he, the witness, said, "You got it after maturity", and the plaintiff answered, "Yes"; that the other notes were all paid and cancelled.

There was introduced in evidence a letter dated February 11, 1888, from the attorneys of the plaintiff to the witness Marshall. It stated that the plaintiff was the holder of note 19, the one here in question; that it had been given to them to collect; that they found

no record of a release deed purporting to be executed and acknowledged by Marshall; that they, the plaintiffs, had confessed judgment on the note for the balance due, and were sending the letter to let Marshall know what had been done so he would have an opportunity to investigate the matter, as to any liability he might have incurred.

The defendants there rested and the plaintiff moved for a finding in his favor. This was overruled. The evidence of the plaintiff is as follows; which, taken literally, is somewhat confusing; that he had known Iver for several years; that he acquired the note on April 20, 1923; that on that date Iver owed him $5,000.00 which was over due; that Iver paid $500.00 on that date and later on gave him the note for $800.00; that he said to Iver that he needed the note and he, the plaintiff, asked him, what for, and Iver said he wanted the note back and he gave it to him and Iver gave him a trust receipt and he, the plaintiff, gave him the note and also another note and Iver kept that for a few days and after a while he gave back the trust receipt; that Iver owed him, prior to April 20, 1923, $7,000.00, andhe, the plaintiff, had a note for it; that Iver gave him a note for $800.00, and he took back a note for $5700.00.

The plaintiff introduced in evidence a note dated April 20, 1923, for $5700.00 signed by Iver. The plaintiff further testified that on April 25, 1923, Iver wanted the note back and he, the plaintiff, gave him the two notes and Iver gave him a trust receipt.

no record of a release deed purporting to be executed and acknowledged by Marshall; that they, the plaintiffs, had confessed judgment on the note for the balance due, and were sending the letter to let Marshall know what had been done so he would have an opportunity to investigate the matter, as to any liability he might have incurred.

The defendants then rested and the plaintiff moved for a finding in his favor. This was overruled. The evidence of the plaintiff is as follows; which, taken literally, is somewhat confusing; that he had known Iver for several years; that he acquired the note on April 20, 1882; that on that date Iver owed him $5,000.00 which was over due; that Iver paid $500.00 on that date and later on gave him the note for $800.00; that he said to Iver that he needed the note and he, the plaintiff, asked him, what for, and Iver said he wanted the note back and he gave it to him and Iver gave him a trust receipt and he, the plaintiff, gave him the note and also another note and Iver kept that for a few days and after a while he gave back the trust receipt; that Iver owed him, prior to April 20, 1882, $7,000.00, and he, the plaintiff, had a note for it; that Iver gave him a note for $800.00, and he took back a note for $6700.00.

The plaintiff introduced in evidence a note dated April 20, 1882, for $6700.00 signed by Iver. The plaintiff further testified that on April 25, 1882, Iver wanted the note back and he, the plaintiff, gave him the two notes and Iver gave him a trust receipt.

The plaintiff offered in evidence a document reciting that he, Iver, had received from him a $1,000.00 note and a note for $5,000.00 which he, Iver, would hold as bailee and turn over on demand, or property of equivalent value.

The plaintiff further testified that he kept asking for the notes; that before the and of June, 1923, Iver gave him back one note; that the note in question he has had in his possession ever since that date; that he first learned of the release of the trust deed when he went to Marshall's office in February, 1925; that he went to Marshall's office in February, 1925, and asked Marshall where Iver was, and Marshall said, he had not seen him for a long time. He further testified that he had possession of the note from the latter part of June, 1923, until he entered up judgment on it; that he has never received any payment for it; that he did not say to Marshall that he got the note after maturity; that he never got the $5,000.00 and is out that amount also; that he had looked for Iver for over a year but could not find him; that he understood he had been indicted.

He further testified that he gave Iver the note in question in April and Iver signed the receipt; that it was returned to him 60 days later with the endorsements on; that he asked Iver for the money, and Iver said, "I will take care of you."

There was offered in evidence on behalf of the defendant, an affidavit signed by N. Albert Iver and dated August 27, 1923, in which Iver deposes and says that "note

The plaintiff offered in evidence a document recording that Ivar, had received from him a $1,000.00 note and a note for $5,000.00 which Ivar, would hold as bailee and turn over on demand, or property of equivalent value.

The plaintiff further testified that he kept asking for the notes; that before the end of June, 1928, Ivar gave him back one note; that the note in question he has had in his possession ever since that date; that he first learned of the release of the trust deed when he went to Marshall's office in February, 1928; that he went to Marshall's office in February, 1928, and asked Marshall where Ivar was, and Marshall said, he had not seen him for a long time. He further testified that he had possession of the note from the latter part of June, 1928, until he entered up judgment on it; that he has never received any payment for it; that he did not say to Marshall that he got the note after maturity; that he never got the $5,000.00 and is out that amount also; that he had looked for Ivar for over a year but could not find him; that he understood he had been indicted.

He further testified that he gave Ivar the note in question in April and Ivar signed the receipt; that it was returned to him 60 days later with the endorsements on; that he asked Ivar for the money, and Ivar said, "I will take care of you."

There was offered in evidence on behalf of the defendant, an affidavit signed by W. Albert Ivar and dated August 27, 1928, in which Ivar deposes and says that "note

No. 19 in the amount of $1,000, mentioned in the trust deed from Nellie McArdle to Edward Marshall, trustee, dated February 27, 1922 * * * has been paid and marked cancelled by me. This affidavit is made for the purpose of securing and indemnifying bond from the American Surety Company of New York, indemnifying the Chicago Title & Trust Company against any loss by the presentment of said note No. 19 for repayment to any alleged holder."

The affidavit of Iver made for the purpose of securing an indemnifying bond, was purely ex parte, and was inadmissible as evidence against the plaintiff. Iver is not a party to the suit, and what he wrote can not be considered as evidence in favor of the defendant and against the plaintiff. If Iver had been called as a witness he could have testified to what he knew, if anything, about the fact of payment, and then could be cross-examined. But, such evidence may not be supplied by an affidavit in pais. Mr. Justice Breese said, in Manny v. Stockton, 34 Ill. 306, "There was no error in excluding the affidavit of Marshall. It was not evidence in the cause, was ex parte, and amounted to no more than hearsay evidence." Shreve v. Town of Cicero, 129 Ill. 226, 229; Quinn v. Rawson, 5 Ill. App. 130; Petrea v. Hediger, 173 Ill. App. 203, 208.

We think the evidence for the plaintiff that he got the note before maturity, that is, before August 27, 1923, is quite overwhelming. It is the testimony of the plaintiff that he got it before maturity and that is corroborated by the so-called trust receipt of Iver, which is not disputed, and which is dated April 25, 1923. Further, then, as to

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We think the evidence for the plaintiff that he got the note before maturity, that is, before August 27, 1922, is quite overwhelming. It is the testimony of the plaintiff that he got it before maturity and that is corroborated by the so-called trust receipt of Iver, which is not disputed, and which is dated April 25, 1922. Further, then, as to

payment, excluding the affidavit of Iver, of August 27, 1923, there is practically no evidence that the note was ever paid. The defense set up in the defendant's affidavit of merits is payment, and yet the most that can be made of the evidence for the defendant is that Iver and his wife agreed to assume it, as part of the lien on the property. That is insufficient. It is claimed that the plaintiff was not diligent, but the defendant was the maker and it was her obligation to pay it, and not the plaintiff to seek her out and make a demand.

It is true the evidence is conflicting and in many ways confusing, but, after the judgment was opened up, it was the duty of thedefendant to prove payment, and, in our judgment, she failed to do so.

The judgment will be reversed and the cause remanded with directions to confirm the judgment of $416.21 in favor of the plaintiff and against the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

O'CONNOR, J. AND THOMSON, J. CONCUR.

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It is true the evidence is conflicting and in many ways confusing, but, after the judgment was opened up, it was the duty of thedefendant to prove payment, and, in our judgment, she failed to do so.

The judgment will be reversed and the cause remanded with directions to confirm the judgment of $416.21 in favor of the plaintiff and against the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

O'CONNOR, J. AND THOMSON, J. CONCUR.

227 - 31046

244 I.A. 630[5]

FRANK WAISMAN, doing business as WAISMAN REALTY COMPANY, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
A. ROOTBERG AND MRS. A. ROOTBERG, Appellant.	

Opinion filed March 2, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action against the defendants to recover $3750.00, which he claimed was due him as commissions for obtaining a purchaser for defendants' property. The amount claimed was three percent of $125,000.00, which plaintiff alleged was the amount received by the defendants for the real estate. The case was tried before the court without a jury and there was a finding and judgment in plaintiff's favor for $3735.00, which was three percent of $124,500.00, being the amount for which the property was actually sold.

Plaintiff offered evidence tending to show that he was engaged in the real estate business in Chicago, and that on July 15, 1923, he and one of his employes were soliciting property owners on Jackson Boulevard to list their real estate for sale with him; that on that date they called on the defendant Mrs. Rootberg at her home on Adams street and that she authorized plaintiff to sell a piece of real estate owned by herself and her husband which was located at the southeast corner of Jackson Boulevard and Springfield avenue; that the price she asked for the property was $126,000.00, subject to

FRANK WAISMAN, doing business as WAISMAN REALTY COMPANY, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
A. ROSTBERG AND MRS. A. ROSTBERG, Appellant.	

Opinion filed March 2, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action against the defendants to recover $2750.00, which he claimed was due him as commissions for obtaining a purchaser for defendants' property. The amount claimed was three percent of $125,000.00, which plaintiff alleged was the amount received by the defendants for the real estate. The case was tried before the court without a jury and there was a finding and judgment in plaintiff's favor for $2750.00, which was three percent of $124,000.00 being the amount for which the property was actually sold.

Plaintiff offered evidence tending to show that he was engaged in the real estate business in Chicago, and that on July 15, 1922, he and one of his employes were soliciting property owners on Jackson Boulevard to list their real estate for sale with him; that on that date they called on the defendant Mrs. Rostberg at her home on Adams street and that she authorized plaintiff to sell a piece of real estate owned by herself and her husband which was located at the southeast corner of Jackson Boulevard and Springfield avenue; that the price she asked for the property was $125,000.00, subject to

two mortgages, one for $57,500 and the other for $20,000.00; that a cash payment of $35,000.00, would be necessary to effect a sale. Plaintiff's evidence further tends to show that Mrs. Rootberg directed them to her husband who was working, on that date, at another address, and that plaintiff and his representative called on Mr. Rootberg and informed him of the conversation they had with Mrs. Rootberg and that he ratified what she had done. Plaintiff's evidence further tends to show that plaintiff listed the property for sale in his real estate office and that in November or December, 1923, he submitted the property to one Benjamin Rodman; that he had taken Rodman to see the property; that Rodman seemed to be interested, but stated that he could not then make the purchase unless he obtained a partner who would be willing to buy the property with him and that when he was ready he would notify plaintiff in the matter. The evidence further shows that on February 4, 1924, the defendants entered into a contract for the sale of the property with Rodman; that the purchase price agreed upon was $124,500.00, and that on March 13th following, the sale was consummated; that sometime afterwards plaintiff learned of this fact and took up the matter of payment of his commission with the defendants, but they denied all liability. The evidence further shows that three per cent was the regular usual commission charged by brokers and there is no complaint that the amount of the judgment is excessive. The only contention is that plaintiff was entitled to nothing because he had nothing to do with the sale of the property, but on the contrary, that it was sold by the defendants themselves.

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The defendants denied that they had listed the property with plaintiff and denied that plaintiff and his representative called upon Mrs. Rootberg on July 15, 1923, or at any other time prior to the sale of the property. Both defendants testified in substance that they never heard of plaintiff in connection with the sale of the property until sometime after the sale was made, when he made a demand for commissions. They both testified that they had never listed the property with him or any of his representatives and had no connection with the plaintiff or his representatives in connection with the sale of the property; that the property was sold to Rodman through a Mr. Stein, who was a partner of the defendant Rootberg, and that Stein was the one who interested Rodman in the property.

Rodman, the purchaser, called by the defendants, testified that the property had not been submitted to him by the plaintiff or any of his representatives; that he had walked into the plaintiff's real estate office sometime in the fall of 1923 inquiring if plaintiff had any bargains in the real estate line and that plaintiff took Rodman to see two pieces of property, but not the property in question; that plaintiff never mentioned the property in question to him. He further testified that he bought the property direct from the owners whom he had known personally and intimately for seventeen or eighteen years; that the defendants had built the building about two years before, that he knew the building from the time it was being built and that he and the defendants visited back and forth frequently.

In addition to plaintiff's testimony a number of

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In addition to plaintiff's testimony a number of

his employes testified corroborating his version of the transaction. We think it would serve no useful purpose to analyze the testimony of the several witnesses in detail, because it appears from what we have said that the evidence offered on behalf of the plaintiff, and that on behalf of the defendants, is in hopeless conflict. There is no doubt a great deal of perjury was committed in this case. We cannot tell upon reading the record, which side is telling the truth, but under the law, we are not warranted in disturbing the judgment, unless we are of the opinion that the finding and judgment of the trial court is against the manifest weight of the evidence. The trial judge was in a much better position to determine the truth of the testimony of the several witnesses than we are. He saw them upon the witness stand. We have only the printed page before us, and since we are unable to say that his finding is against the manifest weight of the evidence, we are not warranted in disturbing the judgment.

Counsel for the defendant argue a number of propositions of law as to what facts must appear before a broker is entitled to his commission. It would serve no useful purpose to discuss the authorities cited, because the law is clear and well understood that before a broker is entitled to a commission, the sale of the real estate must have been brought about by his efforts. He must have been the procuring cause. In the instant case, if the evidence offered on behalf of the plaintiff is to believed, we think, under the law he was entitled to the commission. His evidence is to the effect that the defendants authorized him to list the property for

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sale and to obtain a purchaser for it for $126,000.00; that he listed the property and afterwards showed it to Rodman, who later on purchased it for $24,500.00. In these circumstances, we think there is no rule of law that would warrant us in disturbing the judgment.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

sale and to obtain a purchaser for it for $[illegible]; that he listed the property and afterwards showed it to Podman, who later on purchased it for $[illegible]. In these circumstances, we think there is no rule of law that would warrant us in disturbing the judgment.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

TAYLOR, P.J., (BY [illegible]), J. [illegible].

23 - 31129

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, v. ADAM BARTOSH, Plaintiff in Error.	ERROR TO CRIMINAL COURT, COOK COUNTY.

Opinion filed March 3, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Adam Bartosh was indicted by the grand jury in the Criminal Court of Cook County. The indictment consisted of three counts: The first charged the defendant with larceny as bailee of $500.00, the money of Mary Urbanski; the second count charged that he had obtained $500.00 from Mary Urbanski by means of a confidence game, and the third was a larceny count. The state nolled the second and third counts and waived the felony in the first count. The defendant entered a plea of not guilty, the cause was submitted to the court without a jury, and after hearing the court found the defendant was guilty of "petit larceny", that the property was of the value of $14.00, a fine of $1.00 imposed, and the defendant sentenced to six months in the House of Correction.

The evidence shows that the complaining witness was Mary Rapenski; that she was twenty-three years old and single; that she met the defendant Adam Bartosh in March, 1924; that prior to the time she met him she had been employed in a restaurant washing dishes and later worked in a factory and had saved up $530.00 which she had deposited in a bank.

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

ADAM BARTOSH,

Plaintiff in Error.

ERROR TO

CRIMINAL COURT,

COOK COUNTY.

Opinion filed March 3, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Adam Bartosh was indicted by the grand jury in the Criminal Court of Cook County. The indictment consisted of three counts: The first charged the defendant with larceny as bailee of $500.00, the money of Mary Tchanski; the second count charged that he had obtained $500.00 from Mary Tchanski by means of a confidence game, and the third was a larceny count. The state nolled the second and third counts and waived the felony in the first count. The defendant entered a plea of not guilty, the cause was submitted to the court without a jury, and after hearing the court found the defendant was guilty of "petit larceny", that the property was of the value of $15.00, a fine of $1.00 imposed, and the defendant sentenced to six months in the house of correction.

The evidence shows that the complaining witness was Mary Tchanski; that she was twenty-three years old and single; that she met the defendant Adam Bartosh in March, 1924; that prior to the time she met him she had been employed in a restaurant washing dishes and later worked in a factory and had saved up $530.00 which she had deposited in a bank.

The defendant was about twenty-nine years old, and witnesses for the people testified that he kept company with the complaining witness; that shortly thereafter he proposed marriage to her and was accepted; that he learned that the prosecuting witness had the money in the bank and stated that they would be married and buy a home and for this purpose he wanted to get the money from the complaining witness. She testified through an interpreter that she gave him the money so that he would help pay for a home for them where they could live after they were married. The evidence further shows that shortly thereafter the complaining witness learned that the defendant was a married man and demanded her money back, but was unable to obtain any part of it.

The defendant admitted that he got the money from the complaining witness, having gone to the bank with her for that purpose, but denied that he had proposed marriage or that anything was said between them on that subject, but on the contrary, he testified that he told the complaining witness he wanted to buy a half interest in a soft drink parlor; that she loaned the money for that purpose; that he bought a half interest in the soft drink parlor for $900.00, giving the money, the $530.00 which he had obtained from the complaining witness, in part payment and that he paid the balance out of his own money; that upon purchasing his interest in the soft drink parlor, he proceeded to assist his partner in the operation of it, but a few weeks thereafter the place was closed by the city officials on the ground that his partner had violated the prohibition law by selling whiskey. The defendant further testified that when he borrowed

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The defendant admitted that he got the money from the complaining witness, having gone to the bank with her for that purpose, but denied that he had proposed marriage or that anything was said between them on that subject, but on the contrary, he testified that he told the complaining witness he wanted to buy a half interest in a soft drink parlor; that she loaned the money for that purpose; that he bought a half interest in the soft drink parlor for $800.00, giving the money, the $850.00 which he had obtained from the complaining witness, in part payment and that he paid the balance out of his own money; that upon purchasing his interest in the soft drink parlor, he proceeded to assist his partner in the operation of it, but a few weeks thereafter the place was closed by the city officials on the ground that his partner had violated the prohibition law by selling whiskey. The defendant further testified that when he borrowed

the money from the complaining witness it was to be repaid by him in six months; that when the soft drink parlor was closed by the city officials, he lost the $900.00 which he had invested and that later he saw the complaining witness and told her of this fact and stated that he would pay her in installments, but that she refused to accept her money in installments and that he has paid her nothing. He further testified that when he first met the complaining witness he was married, but was not living with his wife, and that at the time of the trial his wife had obtained a divorce from him. There were witnesses who testified in behalf of the defendant tending to corroborate his version of the matter. The testimony of the complaining witness was also corroborated by other witnesses. At the conclusion of the case the court found the defendant guilty and sentenced him as above stated.

We regret that under the law, we are compelled to reverse the judgment because of a fatal variance between the indictment and the evidence. The indictment charges that the defendant obtained the money of Mary Urbanski, while the evidence shows that the complaining witness was Mary Rapenski. This is fatal. People v. Novotny, 305 Ill. 549. In that case the court said (p.556) "The person whose money was charged to have been obtained was Rapan Manian, but the evidence showed his name to be Mananianian. In indictments for offenses against the persons or property of individuals the Christian and surnames of the parties injured must be stated if known, and the name stated must be either the real name of the party injured or that by which he is usually known; (Aldrich v. People, 225 Ill. 610; Sykes v. People, 132 id. 32; Willis v. People, 1 Scam. 399;) and it is

the money from the complaining witness it was to be repaid by him in six months; that when the soft drink parlor was closed by the city officials, he lost the $800.00 which he had invested and that later he saw the complaining witness and told her of this fact and stated that he would pay her in instalments, but that she refused to accept her money in instalments and that he had paid her nothing. He further testified that when he first met the complaining witness he was married, but was not living with his wife, and that at the time of the trial his wife had obtained a divorce from him. There were witnesses who testified in behalf of the defendant tending to corroborate his version of the matter. The testimony of the complaining witness was also corroborated by other witnesses. At the conclusion of the case the court found the defendant guilty and sentenced him as above stated.

We regret that under the law, we are compelled to reverse the judgment because of a fatal variance between the indictment and the evidence. The indictment charges that the defendant obtained the money of Mary Repenski, while the evidence shows that the complaining witness was Mary Repenski. This is fatal. People v. Moroney, 205 Ill. 549. In that case the court said (p.552) "The person whose money was charged to have been obtained was Rapan Benian, but the evidence showed his name to be Wanamaker. In indictments for offenses against the persons or property of individuals the christian and surnames of the parties injured must be stated if known, and the same stated must be either the real name of the party injured or that by which he is usually known; (Aldrich v. People, 225 Ill. 610; Sykes v. People, 152 id. 32; Mills v. People, 1 Scam. 548;) and it is

essential that the name of the party injured should be proved as laid. There is no conflict of authority on this point. Davis v. People, 19 Ill. 74; Penrod v. People, 89 id. 150; McGary v. People, 45 N.Y.153.) The People's answer to this objection is, that when the evidence was introduced at the trial the plaintiff in error did not object to it and did not point out any variance. The same question arose in People v. Smith, 258 Ill. 503, and it was held that the case presented not a question of variance but of failure of proof; that the indictment charged a crime against a certain person and the proof failed to show it, but did show the crime, if any, was against another person. While the offense of obtaining money by means of the confidences game is punished as a public crime, the particular offense charged is always the obtaining of the property of some individual, whose name therefore becomes material to the description of the offense as stated in the cases cited. Being a material averment it is necessary to be proved, and a failure to prove it is not a mere variance but a fatal lack of evidence to prove the crime charged. There is here no question of idem sonans." In the instant case there was no point made on the trial that the proof varied from the indictment, but under the doctrine announced in the Novotny case, the judgment cannot stand. Mary Rapenski, the complaining witness, from whom the defendant fraudulently obtained the money, is not the same as Mary Urbanski as alleged in the indictment. Nor is Urbanski and Rapenski idem sonans.

We are unable to understand why the count in the indictment, charging that the defendant had obtained money by means of the confidence game was nolled; nor why the

essential that the name of the party injured should be proved as laid. There is no conflict of authority on this point. Davis v. People, 19 Ill. 74; Penoyer v. People, 80 id. 160; McCarty v. People, 45 N.Y.153.) The People's answer to this objection is, that when the evidence was introduced at the trial the plaintiff in error did not object to it and did not point out any variance. The same question arose in Lemple v. Smith, 885 Ill. 508, and it was held that the case presented not a question of variance but of failure of proof; that the indictment charged a crime against a certain person and the proof failed to show it, but did show the crime, if any, was against another person. While the offense of obtaining money by means of the confidence game is punished as a public crime, the particular offense charged is always the obtaining of the property of some individual, whose name therefore becomes material to the description of the offense as stated in the cause cited. Being a material averment it is necessary to be proved, and a failure to prove it is not a mere variance but a total lack of evidence to prove the crime charged. There is here no question of idem sonans." In the instant case there was no point made on the trial that the proof varied from the indictment, but under the doctrine announced in the Lovejoy case, the judgment cannot stand. Mary Papenhoff, the complaining witness, from whom the defendant fraudulently obtained the money, is not the same as Mary Urbanski as alleged in the indictment. Nor is Urbanski and Papenhoff idem sonans.

We are unable to understand why the court in the indictment, charging that the defendant had obtained money by means of the confidence game was noticed; nor why the

felony was waived, because the evidence is clear that the defendant swindled the complaining witness out of her money and should be in the penitentiary and not in the House of Correction. Our Supreme Court in the case of People v. Gallowich, 283 Ill. 360, defined confidence game to be any swindling operation in which advantage is taken of the confidence reposed by the victim in the swindler, and the facts in the instant case bring it clearly within that definition.

For the error above mentioned the judgment of the Criminal Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON, J. CONCURS;
TAYLOR, P.J. DISSENTS.

falsity was proved, because the evidence is clear that the defendant avoided the unreliability attaches not of the money but should be in the penitentiary for not in the house of correction. The Supreme Court in the case of Commonwealth v. Gilfoyle, 322 Ill. 388, without questioning what is in any evaluating experience in which otherwise is taken of the misfiddes received by the victim in the evaluation, and the State in the instant case only is clearly stated that definitions.

For the error above mentioned the judgment of the Criminal Court of Cook County is reversed and the cause remanded.

ATTORNEYS AT CONSIDER.

Mr. Justice Scanlan.

Mr. P. J. Quinlan.

40 - 31152

PEOPLE OF THE STATE OF ILLINOIS, Defendants in Error, v. JOHN BYRUD AND MILTON D. LIPSHUTE, Plaintiffs in Error.	ERROR TO CRIMINAL COURT, COOK COUNTY.

Opinion filed March 2, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

The defendants and one Henry Schmidt were indicted by the grand jury of Cook County, charged with the crime of conspiracy to obtain $1200.00 of the money of the Royal Drug Company, a corporation, by means of false pretenses and by means of the confidence game. Schmidt pleaded guilty, Byrud and Lipshute entered a plea of not guilty. Byrud and Lipschute were tried and the jury returned a verdict finding them guilty of conspiracy as charged in the indictment and fixed their punishment at imprisonment in the penitentiary and a fine of $1,000.00 each. The day after the verdict Schmidt was placed on probation. The court overruled defendants' motion for a new trial and sentenced them to one year in the penitentiary and ordered that the $1,000.00 fine imposed by the jury be worked out in the house of correction at the rate of $1.50 per day.

It appears from the evidence that the defendants and Schmidt conspired together to make Bromo Quinine pills in imitation of pills made by the Paris Medicine Company of St. Louis, Mo., which latter pills had been sold for a great many

PEOPLE OF THE STATE OF ILLINOIS,
Defendants in Error,

v.

JOHN BYRND AND HILTON G. LIPSCUTE,
Plaintiffs in Error.

ERROR TO
CRIMINAL COURT,
COOK COUNTY.

Opinion filed March 3, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

The defendants and one Henry Schmidt were indicted by the grand jury of Cook County, charged with the crime of conspiracy to obtain $1800.00 of the money of the Royal Drug Company, a corporation, by means of false pretenses and by means of the confidence game. Schmidt pleaded guilty, Byrnd and Lipscute entered a plea of not guilty. Byrnd and Lipscute were tried and the jury returned a verdict finding them guilty of conspiracy as charged in the indictment and fixed their punishment at imprisonment in the penitentiary and a fine of $1,000.00 each. The day after the verdict of Schmidt was placed on probation. The court overruled defendants' motion for a new trial and sentenced them to one year in the penitentiary and ordered that the $1,000.00 fine imposed by the jury be worked out in the house of correction at the rate of $1.50 per day.

It appears from the evidence that the defendants and Schmidt conspired together to make Bromo Quinine pills in imitation of pills made by the Parke Medicine Company of St. Louis, Mo., which latter pills had been sold for a great many

years and were considered by the public to have medicinal merit. The scheme or conspiracy of the defendants and Schmidt was to palm off on the public imitation pills for the genuine which could be made and sold much cheaper than the pills of the Paris Medicine Company and it was their desire or intention to make pills that were of no value and to swindle the public. In carrying out their purpose the defendants and Schmidt had a die made, lettered the same as the pills of the Paris Medicine Company were labeled. From another person they had certain engraving work done and from a third they had printing, labels and other matter made, all of which was for the purpose of so labeling and packing their fraudulent pills as to make the public believe they were the genuine article. They then manufactured their fraudulent pills and sold several gross of them to the Royal Drug Company, a wholesale drug concern doing business in Chicago, for $1300.00. This was much cheaper than the genuine article could be purchased for. So that they might be able to sell their fruaudlent pills and make it appear that they were apparently genuine, they went to Milwaukee, wrapped up a bundle of newspapers and had them shipped to Chicago, and to show the Royal Drug Company that they had purchased the pills, they exhibited the bills of lading showing that they had been shipped to the defendants by the Majestic Drug Company of Milwaukee.

Sometime later the Paris Medicine Company, who made the genuine pills learned of the false product and employed the Burns Detective Agency to investigate the matter. This was done by the detective agency, whose employes worked in conjunction with the State's Attorney's

years and were considered by the public to have medicinal merit. The scheme or conspiracy of the defendants and Schmidt was to palm off on the public imitation pills for the genuine which could be made and sold much cheaper than the pills of the Paris Medicine Company and it was their desire or intention to make pills that were of no value and to swindle the public. In carrying out their purpose the defendants and Schmidt had a die made, lettered the same as the pills of the Paris Medicine Company were labeled. From another person they had certain engraving work done and from a third they had printing, labels and other matter made, all of which was for the purpose of so labeling and packing their fraudulent pills as to make the public believe they were the genuine article. They then manufactured their fraudulent pills and sold several gross of them to the Royal Drug Company, a wholesale drug concern doing business in Chicago, for $1500.00. This was much cheaper than the genuine article could be purchased for. So that they might be able to sell their fraudulent pills and make it appear that they were apparently genuine, they went to Milwaukee, wrapped up a bundle of newspapers and had them shipped to Chicago, and to show the Royal Drug Company that they had purchased the pills, they exhibited the bills of lading showing that they had been shipped to the defendants by the Majestic Drug Company of Milwaukee.

Sometime later the Paris Medicine Company, who made the genuine pills learned of the false product and employed the Dana Detective Agency to investigate the matter. This was done by the detective agency, whose employee worked in conjunction with the State's Attorney's

office. When the defendants and Schmidt were confronted with the evidence, they made statement in the State's Attorney's office before Assistant State's Attorneys, police officers, representatives of the detective agency and others, confessing their guilt. As stated, Schmidt pleaded guilty and testified for the state. Neither of the defendants testified, nor was any evidence offered on their behalf. The jury were instructed and afterwards returned their verdict as above mentioned. The state offered some thirty odd exhibits such as the die, the engraving and printing of labels, etc. but none of them are shown by the bill of exceptions.

The defendants contend that the court erred in not permitting them to show that the statements or confessions made by them were obtained through promises of immunity. The record discloses that when the witness Allen, a shorthand reporter, who had taken the confessions made by the defendants in the State's Attorney's office, was testifying for the state, counsel for the defendants interposed an objection, and the court and counsel then went into chambers and counsel for the defendants told the court that one McKee, who was an detective employed by the Burns Detective Agency in the matter had told the defendants that if they would tell all they knew in the matter, they would not be prosecuted, because the only object was to prevent the further sale of the spurious pills, and that relying upon such promise of immunity the defendants made the confessions. The court held that McKee had no authority to promise such immunity and would not permit the defendants to go into that question, and they excepted to the ruling of the court. Allen did not testify but the state called Frank G. Marshall, an attorney employed

office. When the defendants and Schmidt were confronted with the evidence, they made statement in the State's Attorney's office before Assistant State's Attorney, police officers, representatives of the detective agency and others, confessing their guilt. As stated, Schmidt pleaded guilty and testified for the state. Neither of the defendants testified, nor was any evidence offered on their behalf. The jury were instructed and afterwards returned their verdict as above mentioned. The state offered some thirty odd exhibits such as the die, the engraving and printing of labels, etc. but none of them are shown by the bill of exceptions.

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by the Paris Medicine Company, who had been assisting in investigating and preparing the evidence in the case. He testified, inter alia that he was present at the time the defendants confessed and that there was no promise of immunity made; that the assistant state's attorney, who was in charge of the matter informed the defendants that they could make a statement or not as they chose, but that ifthey did make a statement it would be used against them. On cross-examination of this witness counsel for the defendant again sought to show that McKee of the detective agency had promised the defendants that if they confessed there would be no prosecution, but the court upon objection refused to permit him to question the witness on this subject. Counsel for the defendant then asked the court to adjourn to chambers, but this was refused and the court shortly thereafter adjourned until the afternoon. When the court again was convened, the court and counsel for the defendants then stated that he wished to show by questions put to Marshall and to the Assistant State's Attorney, who had conducted the questioning of the defendants when they made their confession that McKee, the detective, who had charge of the investigation of the matter for the Paris Medicine Company, had promised immunity to the defendants. The court again overruled counsel and afterwards there was considerable discussion between the court and counsel for the defendants, during which we think the court made remarks that were unwarranted and should not have been made. We are also of the opinion that the court erred in not permitting counsel for the defendant to show by cross-examination of the witnesses that McKee had made promises of immunity, as stated, for the reason that McKee had been investigating the

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matter and gathered the evidence, and the defendants might well have thought that McKee was speaking with authority, and if there were any doubt of the guilt of the defendants, these errors would warrant a reversal of the judgment. But from a consideration of all the evidence in the record, the guilt of the defendants is so clear that we think the verdict of the jury ought not to be disturbed. Of course, it is the law that if a confession is made with promise of immunity, it is inadmissible. However, the witness Marshall for the state and the Assistant State's Attorney, to whom the confessions were made, both testified that there was no promise of immunity, but on the contrary, the defendants were expressly advised that they need not make a statement, but that if they did, it would be used against them. The confessions made by the defendants were taken down in shorthand by a court reporter and transcribed, but they were not offered in evidence. But what took place at the time was testified to by witnesses and counsel for the defendants states that this was error, because if the confessions were inadmissible, it would be the written confession. This is obviously unsound. Any one could testify to what was said and done at the time.

The defendants further contend that the state should have been required to elect under which count of the indictment it would proceed. A motion of the defendants' to this effect was made at the close of the case and denied, and we think the ruling was entirely proper, because under the law, a count charging conspiracy to obtain money by false pretenses is properly joined with a count charging conspiracy to obtain the same money by means of the confidence

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game. People v. Warfield, 261 Ill. 293. The state's case shows that both counts were based on the same fact that the defendants had obtained $1200.00 from the Royal Drug Company.

A further point is made that the court erred in permitting Schmidt, who was jointly indicted with the two defendants to testify, because Schmidt was permitted to sit in the court room during theprogress of the trial, although a rule had been entered excluding all of the witnesses, and for the further reason that Schmidtls name was not given to the defendants as one who would be called by the people. We think the matter was entirely within the discretion of the court. While it would have been proper practice to have excluded Schmidt from the court room, yet it appears that counselfor the defendants must have known that when Schmidt entered a plea of guilty, he would probably be called as a witness for the State, but they made no objection when they saw him sitting in the court room. We think the defendants were not prejudiced by the action of the trial court. It is further contended that the court erred in not permitting counsel for the defendant to cross-examine Schmidt in an endeavor to elicit from him the fact that he had been promised immunity. This witness testified on direct-examination that he had made a statement in the State's Attorney's office at the time the statements or confessions were made by the two defendants and after testifying at considerable length, both on direct and cross-examination, he testified on cross-examination he had never received any promises of immunity or reward. He was then asked: "Q. Do you expect to

case, People v. Murfield, 201 Ill. 322, the state's case above that both courts were based on the same fact - that the defendants had obtained $1500.00 from the Royal Drug Company.

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go to the penitentiary in this case?" This was objected to and the objection sustained, the court stating that it did not make any difference since the witness had pleaded guilty. We think the court should have overruled the objection and permitted the witness to answer, because the witness was a confessed swindler and the defendants were entitled to bring out any fact tending to show that he expected not to bepunished as a reward for testifying for the state. However, in view of the fact that the guilt of the defendants appears beyond all reasonable doubt, we think the error would not warrant us in disturbing the judgment.

A further point is made that the court erred in allowing exhibits to be taken by the jury while they were considering their verdict. We have no means of telling whether the exhibits were taken by the jury. The record is silent on this subject. In the trial of criminal cases the common law rule applies, which permits the court in its discretion to allow the jury to take with them, upon their retirement, such papers and documents introduced in evidence as in his sound discretion he shall think proper. Dunn v. People, 172 Ill. 582-588; Cook v. People, 231 Ill. 9-15.

In the Dunn case the court after referring to Sec. 8 of Division 13 of the Criminal Code, which provides that "All trials for criminal offenses shall be conducted according to the course of the common law, except when the Criminal Code points out a different mode, and the rules of evidence of the common law shall also be binding upon all courts and juries in criminal cases except as otherwise pro-

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In the Hunn case the court after referring to Sec. 8 of Division IX of the Criminal Code, which provides that "All trials for criminal offenses shall be conducted according to the course of the common law, except when the Criminal Code points out a different mode, and the rules of evidence of the common law shall also be binding upon all courts and juries in criminal cases except as otherwise pro-

vided by law." said (p.588) "Nothing in the said division of the Criminal Code purports to direct what shall be taken by the jury from the bar of the court. The common law rule in criminal cases was, that the jury, when they retired to deliberate on their verdict, should take with them such books and papers which had been produced in evidence as the judge presiding should direct." In the instant case, as stated, the record is silent as to whether the exhibits were actually taken by the jury, but even if they were, no objection was made by counsel for the defendants, but on the contrary what was done in this regard seems to have met with his approval,,and he is in no position to now raise the point for the first time. Moreover, we think it was entirely proper to permit the exhibits to be taken by the jury. They were labels, dies, printing matter, etc. and it was proper that the jury should consider them in arriving at their verdict. In this connection, however, the defendant argues that the exhibits were not read to the jury during the progress of the trial and that the law requires all evidence to be presented in open court. In support of their contention, the case of People v. Clark 301 Ill. 428 is cited. In that case there appears to have been grave doubt in the court's mind as to the guilt of Clark. Moreover, the exhibits there introduced in evidence and which were taken to the jury room were now shown to the jury as counsel for the defendant insisted he had a right to do, nor was counsel there permitted to exhibit them to the jury.

In the instant case the guilt of the defendants is clear. No objection was made on the trial that the exhibits had not been read or shown to the jury. No complaint

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In the instant case the guilt of the defendants is clear. No objection was made on the trial that the exhibits had not been read or shown to the jury. No complaint

was made that the defendants were not permitted by their counsel to exhibit them to the jury, but the record discloses that the exhibits were considered by counsel for the defendants, and no suggestion was made to the contrary until the brief was filed on behalf of the defendants in this court. We are clearly of the opinion that the Clark case is not in point and there was no error prejudicial to the defendants of which they can complain.

A further complaint is made to the giving of peoples' instruction No. 5 and the refusing of defendants instruction No. 4. The instructions are not numbered in the abstract or in the record and if they are counted it will be found that the argument of the defendants does not fit the numbers of the instructions designated by their counsel. Moreover, the defendants point out no specific objection to the given instruction complained of. But, even if we take counsel's contentions as stated in their brief and apply them to the instruction that he appears to have in mind, we think there is no merit in them, nor do we think there is any merit in the contention of counsel for the defendants to the effect that the argument of one of the Assistant State's Attorneys was improper. A reading of the entire argument, which is in the record, leaves no doubt in our minds that it is free from prejudicial error.

The further point is made that the court erred in not striking the bill of particulars filed by the people from the files and in not granting the defendants a continuance. In support of the contention that the bill of particulars

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The further point is made that the court erred in not striking the bill of particulars filed by the people from the files and in not granting the defendants a continuance. In support of the contention that the bill of particulars

should have been stricken, counsel say that the record discloses that the bill of particulars should have been filed on May 18, 1925, but that it was not filed until June 11, 1925, and therefore, not being in accordance with the order of court, it should have been stricken, and for the further reason that it did not acquaint the defendants with the charges which they would have to meet. Upon a careful consideration of the record there can be no doubt that the defendants were fully aware of the charge that was to be made against them and the evidence that would be adduced, in support thereof. They had made statements or confessions and they knew that Schmidt, their co-conspirator, had done likewise and heard that he had confessed, all of the confessions having been made at the same time and before the same parties. It clearly appears that they were in no way prejudicied on account of the late filing of the bill of particulars or on account of any of its insufficiencies. Nor was there any error in the ruling of the court denying the defendants a continuance. This contention is based on the fact that the bill of particulars was not filed at the time it was ordered that it be done and counsel for the defendants say that they were not prepared for trial on account of the delay in filing it; that it was not filed until a few days before the case was ordered to trial, and that this is shown by the affidavits filed by the defendants in support of their motion for a new trial. The record discloses that on the motion for a new trial, the defendants were represented by counsel other than those who appeared for them on the trial, and each of the defendants made an affidavit in support of a new trial both of them being substantially the same. The affidavits set up that

being substantially the same. The affidavits set up that those who appeared for them on the trial, and each of the defendants made an affidavit in support of a new trial both of them being substantially the same. The affidavits set up that the defendants with the charges which they would have to meet. Upon a careful consideration of the record there can be no doubt that the defendants were fully aware of the charge that was to be made against them and the evidence that would be adduced, in support thereof. They had made statements or confessions and they knew that Schmidt, their co-conspirator, had done likewise and heard what he had confessed, all of the confessions having been made at the same time and before the same parties. It clearly appears that they were in no way prejudiced on account of the late filing of the bill of particulars or on account of any of its insufficiencies. Nor was there any error in the ruling of the court denying the defendants a continuance. This contention is based on the fact that the bill of particulars was not filed at the time it was ordered that it be done and counsel for the defendants say that they were not prepared for trial on account of the delay in filing it; that it was not filed until a few days before the case was ordered to trial, and that this is shown by the affidavits filed by the defendants in support of their motion for a new trial. The record discloses that on the motion for a new trial, the defendants were represented by counsel other than

they relied upon their counsel, who advised them that the court had entered a rule upon the state to file a bill of particulars and that it was not filed until long after the time had expired; that it was not filed until about June 12, 1925, and when this was learned the defendants were advised by their counsel that it would be unnecessary to be ready for trial on June 15th when the case was set for trial; that relying upon their counsel in this regard, they did not prepare for trial and were not prepared when the case, over their objection, went to trial on June 15th; that at the time they were arrested in April, 1925, an Assistant State's Attorney, a representative of the Paris Medicine Company, an attorney for the Burns Detective Agency and a police officer came to the defendant Byrud's place of business and informed him that they wanted him at the State's Attorney's office; that he went with them and was kept thereuntil 8:00 P.M. on the same day and was not allowed to communicate with counsel or any one else; that he was questioned relative to his knowledge of the commission of the crime in question; that he was told by the Assistant State's Attorney that if he would tell all that he knew no harm would come to him; that he was also told the same thing by the other parties who had him in custody; that he refused to and did not admit his guilt of any crime; that thereupon the Assistant State's Attorney ordered the defendants taken to the police station, which was done and they were held without booking or warrant; that they were not permitted to talk or communicate with any person; that they were then taken in a patrol wagon and held until ten o'clock the next day without food or drink; that they then obtained a release on bond and returned to their places

they relied upon their counsel, who advised them that the court had entered a rule upon the state to file a bill of particulars and that it was not filed until long after the time had expired; that it was not filed until about June 13, 1888, and when this was learned the defendants were advised by their counsel that it would be unnecessary to be ready for trial on June 13th when the case was set for trial; that relying upon their counsel in this regard, they did not prepare for trial and were not prepared when the case, over their objection, went to trial on June 18th; that at the time they were arrested in April, 1888, an Assistant State's Attorney, a representative of the Paris Medicine Company, an attorney for the Burns Detective Agency and a police officer came to the defendant Byrd's place of business and informed him that they wanted him at the State's Attorney's office; that he went with them and was kept thereuntil 8:00 P.M. on the same day and was not allowed to communicate with counsel or any one else; that he was questioned relative to his knowledge of the commission of the crime in question; that he was told by the Assistant State's Attorney that if he would tell all that he knew no harm would come to him; that he was also told the same thing by the other parties who had him in custody; that he refused to and did not admit his guilt of any crime; that thereupon the Assistant State's Attorney ordered the defendants taken to the police station, which was done and they were held without booking or warrant; that they were not permitted to talk or communicate with any person; that they were then taken in a patrol wagon and held until ten o'clock the next day without food or drink; that they then obtained a release on bond and returned to their places

of business; that about three o'clock in the afternoon of the same day the Assistant State's Attorney and other parties and a detective from the Burns Detective Agency again went to the defendant Byrud's place of business; that the detective learned that the defendant Byrud belonged to the Masonic Order and told Byrud that if he would tell all the truth about what had taken place, no harm would come to him and he would not be prosecuted; that thereupon Byrud stated that if they would do the same for the defendant Lipshute, he would make a full statement of all he knew in regard to the matter; that the detective then stated that both the defendants would be given immunity and would not be prosecuted; that afterwards they met the detective as per appointment at six o'clock in the afternoon when they had their first meal in two days; that the defendants then went to the offices of the detective agency and talked over the matter, and that defendants told McKee, the detective, frankly and without reservation all that they knew of said cause, and that afterwards in accordance with the agreement with McKee, on the next morning, they went to the State's Attorney's office and then repeated their stories there, which was taken down by a stenographer; that this was Saturday and that the Assistant State's Attorney told them to return Monday and sign the statements made by them; that they did return on Monday but refused to sign the statements because they did not contain any promises of immunity, and thereupon the Assistant State's Attorney told them that he did not care whether they signed them or not and they then left. The affidavits further set up that they were willing upon the trial to relate all the facts contained in the affidavits and sought to do so through their counsel, but that the court

of business; that about three o'clock in the afternoon of the same day the Assistant State's Attorney and other parties and a detective from the Burns Detective Agency again went to the defendant Byrnd's place of business; that the detective learned that the defendant Byrnd belonged to the Masonic Order and told Byrnd that if he would tell all the truth about what had taken place, no harm would come to him and he would not be prosecuted; that thereupon Byrnd stated that if they would do the same for the defendant Lipshute, he would make a full statement of all he knew in regard to the matter; that the detective then stated that both the defendants would be given immunity and would not be prosecuted; that afterwards they met the detective as per appointment at six o'clock in the afternoon when they had their first meal in two days; that the defendants then went to the office of the detective agency and talked over the matter, and that defendants told Mike, the detective, freely and without reservation all that they knew of said cause; and that afterwards in accordance with the agreement with Mike, on the next morning, they went to the State's Attorney's office and then repeated their stories there, which was taken down by a stenographer; that this was Saturday and that the Assistant State's Attorney told them to return Monday and sign the statements made by them; that they did return on Monday but refused to sign the statements because they did not contain any promises of immunity, and thereupon the Assistant State's Attorney told them that he did not care whether they signed them or not and they then left. The affidavits further set up that they were willing upon the trial to relate all the facts contained in the affidavits and sought to go as through their counsel, but that the court

ruled that anything that transpired between them and McKee was immaterial. This is rather a novel way of securing a new trial. The defendants were present in open court and should have then testified or at least an offer should have been made by their counsel as to what they would testify to and not wait until they were convicted and then set up by way of affidavits the facts that they should have testified to on the trial. Moreover, we are clearly of the opinion that these affidavits, as well as the evidence in the record, shows the guilt of the two defendants beyond all reasonable doubt. There is no denial of their guilt in these affidavits, but on the contrary, they admit their guilt. There are a number of errors in the record and would warrant a reversal of a judgment in a criminal case under many circumstances, but we are of the opinion that that ought not to be the result here where there can be no doubt of the guilt of the defendants. People v. Halpin, 276 Ill. 363; People v. Stover, 317 Ill. 191; People v. Thompson, 321 Ill. 594; People v. Kessler, 324 Ill. 304.

Although the point is not made, we are compelled to reverse the judgment and remand the cause so that a proper judgment may be entered on the verdict. By verdict the defendants were found guilty and their punishment fixed by the jury at imprisonment in the penitentiary and a fine of $1,000.00. The sentence should have been an indeterminate one in the penitentiary and not fixed at one year as was done. People v. Graves, 304 Ill. 20; People v. Lloyd, 304 Ill. 23. Nor was the court warranted in adjudging that the fine of $1,000.00, imposed by the jury on each of the defendants should be worked out in the House of Correction. There is no

ruled that anything that transpires between them and defendants was immaterial. This is rather a novel way of resuming a new trial. The defendants were present in open court and should have then testified or at least an offer should have been made by their counsel as to what they would testify to and not wait until they were convicted and then set up by way of affidavits the facts that they should have testified to on the trial. Moreover, we are clearly of the opinion that these affidavits, as well as the evidence in the record, show the guilt of the the defendants beyond all reasonable doubt. There is no denial of their guilt in these affidavits, but on the contrary, they admit their guilt. There are a number of errors in the record and merely attack a correct ruling of a judgment in a criminal case with many circumstances, but in spite of the opinion that that\ought not be so the result has been that there can be no doubt of the guilt of the defendants. People v. Malpin, 279 Ill. 389; People v. Brown, 217 Ill. 181; People v. Thompson, 221 Ill. 284; People v. Kemler, 254 Ill. 304.

Although the point is not made, we are compelled to reverse the judgment and remand the cause so that a proper judgment may be entered on the verdict. By verdict the defendants were found guilty and their punishment fixed by the jury at imprisonment in the penitentiary and a fine of $1,000.00. The sentence should have been an indeterminate one in the penitentiary and not fixed at one year as was done. People v. Kerner, 254 Ill. 80; People v. Lloyd, 304 Ill. 82. Nor was the court warranted in adjudging that the fine of $1,000.00, imposed by the jury on each of the defendants should be worked out in the House of Correction. There is no

warrant in the law for such a judgment where the defendants are found guilty of conspiracy under Sec. 46 of the Criminal Code, and the penalty fixed at imprisonment in the penitentiary and a fine imposed, as was the fact in the instant case.

For the error in not entering the proper judgment on the verdict, the judgment will be reversed and the cause remanded to the Criminal Court of Cook County with directions to the court to enter a proper judgment sentencing the defendants on the verdict. This is the proper procedure. People v. Boer, 262 Ill. 152; Wallace v. People, 159 Ill. 446; People v. Coleman, 251 Ill. 497.

REVERSED AND REMANDED WITH DIRECTIONS.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

warrant in the law for such a judgment where the defendants are found guilty of conspiracy under sec. 4; of the Criminal Code, and the penalty fixed at imprisonment in the penitentiary and a fine imposed, as was the fact in the instant case.

For the error in not entering the proper judgment on the verdict, the judgment will be reversed, the cause remanded to the Criminal Court of Cook County with directions to the court to enter a proper judgment sentencing the defendants on the verdict. This is the proper procedure. People v. Scott, 201 Ill. 247; Milliken v. People, 104 Ill. 449; People v. Williams, 200 Ill. 447.

REVERSED AND REMANDED WITH DIRECTIONS.

Taylor, P.J., and Thomas, J., dissent.

70 - 31194

CARL LARSON, Defendant in Error, v. E. KAHN & COMPANY, a corp., Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

Opinion filed March 2, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this writ of error the defendant seeks to reverse a judgment entered against it on March 7, 1924, for $625.00.

The record discloses that on January 29, 1924, plaintiff filed his statement of claim alleging that the defendant owed him $625.00 for potatoes sold and delivered. The suit was returnable February 5th and on that date the defendant's appearance was entered by its counsel as "E. Kahn & Co., a corp. herein sued as E. Kahn & Co." The defendant was named in the praecipe and statement of claim and summons as "E. Kahn & Company." On the 5th of February an order was entered giving the defendant ten days within which to file its affidavit of merits. On February 19th no affidavit of merits having been filed, the defendant was defaulted and judgment entered for $625.00. This was vacated and set aside on February 23rd, by stipulation of the parties, and the defendant given ten days within which to file an affidavit of merits. The defendant failed to file any affidavit of merits

70 - 31194

OAKES LARSON, Defendant in Error, v. E. KAHN & COMPANY, a corp., Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

Opinion filed March 3, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this writ of error the defendant seeks to reverse a judgment entered against it on March 7, 1924, for $225.00.

The record discloses that on January 29, 1924, plaintiff filed his statement of claim alleging that the defendant owed him $225.00 for perspectives sold and delivered. The suit was returnable February 5th and on that date the defendant's appearance was entered by its counsel as "E. Kahn & Co., a corp. herein sued as E. Kahn & Co." The defendant was named in the praecipe and statement of claim and summons as "E. Kahn & Company." On the 5th of February an order was entered giving the defendant ten days within which to file its affidavit of merits. On February 13th no affidavit of merits having been filed, the defendant was defaulted and judgment entered for $225.00. This was vacated and set aside on February 23rd, by stipulation of the parties, and the defendant given ten days within which to file an affidavit of merits. The defendant failed to file any affidavit of merits

and on March 7th it was again defaulted and judgment entered against it for $625.00. On May 2nd by stipulation of the parties, the default and judgment of March 7th was vacated and set aside and the defendant was given leave to file its affidavit of merits within ten days from April 30th. On May 14th the defendant having again failed to file its affidavit of merits, a default judgment was entered against it for a third time for $625.00. On June 12th, the record discloses, that an order was entered setting aside and vacating the default judgment of May 14th and also setting aside the order of May 12th which vacated the default and judgment of March 7th, and it was further ordered that the defendant be given ten days within which to file a petition to vacate the default and judgment of March 7, 1924. Afterwards on November 7, 1924, on motion of the defendant, it was ordered that the defendant be given leave to withdraw its petition to vacate the judgment of March 7th and leave was given the defendant to file and amended petition within five days. On December 26th, following, an order was entered reciting that the matter come on for hearing on the defendant's petition to vacate the default and judgment, and that the court found against the defendant and dismissed its petition, from which order the defendant prayed an appeal to this court, which was allowed upon defendants filing its bond in the sum of $1200.00 within twenty days and bill of exceptions within thirty days. On January 15, 1925 the defendant moved the court for leave to file another petition to vacate the judgment. The motion was denied and an appeal prayed and allowed to this court upon the defendant filing a bond of $250.00 within twenty days and bill of exceptions within thirty days, and on that date the defendant filed its appeal

and on March 7th it was again defaulted and judgment entered against it for $285.00. On May 2nd by stipulation of the parties, the default and judgment of March 7th was vacated and set aside and the defendant was given leave to file its affidavit of merits within ten days from April 30th. On May 14th the defendant having again failed to file its affidavit of merits, a default judgment was entered against it for a third time for $285.00. On June 18th, the record discloses, that an order was entered setting aside and vacating the default judgment of May 14th and also setting aside the order of May 12th which vacated the default and judgment of March 7th, and it was further ordered that the defendant be given ten days within which to file a petition to vacate the default and judgment of March 7, 1924. Afterwards on November 7, 1924, on motion of the defendant, it was ordered that the defendant be given leave to withdraw its petition to vacate the judgment of March 7th and leave was given the defendant to file and amended petition within five days. On December 28th, following, an order was entered recitting that the matter came on for hearing on the defendant's petition to vacate the default and judgment, and that the court found against the defendant and dismissed its petition, from which order the defendant prayed an appeal to this court, which was allowed upon defendants filing its bond in the sum of $1500.00 within twenty days and bill of exceptions within thirty days. On January 15, 1925 the defendant moved the court for leave to file another petition to vacate the judgment. The motion was denied and an appeal prayed and allowed to this court upon the defendant filing a bond of $500.00 within twenty days and bill of exceptions within thirty days, and on that date the defendant filed its appeal

bond, which was approved by the court.

Afterwards on January 24, 1925, by stipulation of the parties the order approving the appeal bond of January 15th was vacated and set aside and the appeal bond withdrawn, and it was further ordered that the order of December 26, 1924, above mentioned, be vacated and set aside and leave was then given to the defendant to file an amended petition to vacate the judgment and the defendant was ruled to answer the same within ten days. On February 21, 1925, the court overruled the defendant's motion to strike plaintiff's motion to strike the amended petition of the defendant, and the defendant's amended petition was stricken for want of jurisdiction. From this order defendant prayed and was allowed an appeal to the Supreme Court upon filing a bond within twenty days and bill of exceptions within ninety days. The appeal bond was filed and apparently this proceeding was dismissed by the Supreme Court. Later the defendant sued out a writ of error from the Supreme Court and that court transferred the cause to this court.

From the foregoing recitation of the facts as shown by the record, it is clear that the defendant has been trifling with the courts. Three judgments were rendered against it and later it filed three petitions to vacate the judgment of March 7, 1924.

The defendant first contends that the judgment is wrong and should be reversed because the judgment is against E. Kahn & Co. "without E. Kahn & Co. having been a party to the suit is not a judgment against the defendant E. Kahn &

bond, which was approved by the court.

Afterwards on January 24, 1925, by stipulation of the parties the order approving the appeal bond of January 15th was vacated and set aside and the appeal was withdrawn, and it was further stipulated that the order of December 26, 1924, above mentioned, be vacated and set aside and leave was then given to the defendant to file an amended petition to vacate the judgment and the defendant was ruled to answer the same within ten days. On February 21, 1925, the court overruled the defendant's motion to strike plaintiff's motion to strike the amended petition of the defendant, and the defendant's amended petition was stricken for want of jurisdiction. From this order defendant prayed and was allowed an appeal to the Supreme Court upon filing a bond within twenty days and bill of exceptions within ninety days. The appeal bond was filed and apparently this proceeding was dismissed by the Supreme Court. Later the defendant sued out a writ of error from the Supreme Court and that court transferred the cause to this court.

From the foregoing recitation of the facts as shown by the record, it is clear that the defendant has been trifling with the courts. Three judgments were rendered against it and later it filed three petitions to vacate the judgment of March 7, 1924.

The defendant first contends that the judgment is wrong and should be reversed because the judgment is against E. Kahn & Co. "without E. Kahn & Co. having been a party to the suit is not a judgment against the defendant E. Kahn &

Company, a corporation." This argument discloses further trifling with the court. The suit was brought against E. Kahn & Company, and that company was served. Its appearance was entered as E. Kahn & Co., a corporation. There is no merit in the contention.

A further complaint is made that the court was without authority on June 12th to vacate the order of May 2, 1924, which vacated the default and judgment of March 7, 1924, because it is said the order of June 12th was more than thirty days after the entry of the order of May 2nd, and that the Municipal Court is without authority to enter orders after the lapse of thirty days. It is true that the Municipal Court has no authority to vacate a judgment or final order after thirty days has elapsed, but that rule of law has no application because the order of May 2nd was not a final order; that order merely vacated the judgment and default and gave the defendant leave to file an affidavit of merits. Such an order is not a final order and may be vacated at any time while the suit is pending. Moreover, the defendant is in no position to question the order of June 12th vacating the order of May 2nd, because the order of June 12th in addition to vacating the order entered May 2nd gave the defendant leave to file its petition to vacate the default and judgment of March 7th, and the defendant afterwards treated this order to June 12th as valid and binding because it subsequently filed three different petitions seeking to vacate the default and judgment of March 7th. Having thus taken the position that the order of June 12th was valid and binding, the defendant will not be permitted to stultify itself and now claim that

Company, a corporation." This argument discloses further trifling with the court. The suit was brought against E. Kahn & Company, and that company was served. Its appearance was entered as E. Kahn & Co., a corporation. There is no merit in the contention.

A further complaint is made that the court was without authority on June 12th to vacate the order of May 2, 1924, which vacated the default and judgment of March 7, 1924, because it is said the order of June 12th was more than thirty days after the entry of the order of May 2nd, and that the Municipal Court is without authority to enter orders after the lapse of thirty days. It is true that the municipal Court has no authority to vacate a judgment or final order after thirty days has elapsed, but that rule of law has no application because the order of May 2nd was not a final order; that order merely vacated the judgment and default and gave the defendant leave to file an affidavit of merits. Such an order is not a final order and may be vacated at any time while the suit is pending. Moreover, the defendant is in no position to question the order of June 12th vacating the order of May 2nd, because the order of June 12th in addition to vacating the order entered May 2nd gave the defendant leave to file its petition to vacate the default and judgment of March 7th, and the defendant afterwards treated this order to June 12th as valid and binding because it subsequently filed three different petitions seeking to vacate the default and judgment of March 07th. Having thus taken the position that the order of June 12th was valid and binding, the defendant will not be permitted to stultify itself and now claim that

the court had no authority to enter that order. The defendant by filing its three petitions to vacate the default and judgment of March 7th treated that judgment as being in full force and effect and it cannot now advance any contrary position.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

the court had no authority to enter that order. The defendant by filing its three petitions to vacate the default and judgment of March 7th treated that judgment as being in full force and effect and it cannot now advance any contrary position.

The judgment of the municipal court of Kansas is affirmed.

AFFIRMED.

TAYLOR, P.J. and O'CONNOR, J. concur.

84 - 31210

OLIVE LEITCH and DOLLIE F. LEITCH, Plaintiffs in Error, v. UNION STOCK YARD & TRANSIT COMPANY OF CHICAGO, a corporation, et al, ——— ARMOUR MECHANICAL COMPANY, Defendant in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

OPINION filed March 2, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this writ of error plaintiffs seek to reverse an order entered by the Municipal Court of Chicago on the 31st of July, 1924, by which the service of summons was quashed on motion of the defendant, the Armour Mechanical Company.

On May 15, 1924, plaintiffs brought an action of forcible detainer against eleven defendants for possession of certain real estate in Chicago. They also claimed $394,800. due them for the use and occupation of the premises by the defendants. Service was had upon all of the defendants. The Armour Mechanical Company one of the defendants in the trial court and the sole defendant in error in this court, filed a motion to quash the service. The motion was sustained and the service quashed. All of the other defendants filed their affidavits of merits so that the cause is at issue as to all of the defendants, except the Armour Mechanical

84 - 31813

CLYDE LEITON and DORLIE V. LEITON, Plaintiffs in Error, v. BLOCK STOCK YARD & TRANSIT COMPANY OF CHICAGO, a corporation, et al., Defendant in Error.	Error to MUNICIPAL COURT OF CHICAGO.

ARMOUR MECHANICAL COMPANY.

OPINION filed March 2, 1934.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this writ of error plaintiffs seek to review an order entered by the Municipal Court of Chicago on the 31st of July, 1934, by which the service of summons was quashed on motion of the defendant, the Armour Mechanical Company.

On May 15, 1934, plaintiffs brought an action of forcible detainer against eleven defendants for possession of certain real estate in Chicago. They also claimed $750.00, due them for the use and occupation of the premises by the defendants. Service was had upon all of the defendants. The Armour Mechanical Company was of the defendants in the trial court and the sole defendant in error in this court. Filed a motion to quash the service. The motion was sustained and the service quashed. All of the other defendants filed their affidavits of merits so that the cause is at issue as to all of the defendants, except the Armour Mechanical

Company. The service having been quashed as to it, plaintiff moved the court for a default and judgment against it for want of appearance and affidavit of merits, this was denied, and it is obvious there was no basis for this motion because the service as to the Armour Mechanical Company had been quashed. The plaintiffs thereupon prayed for and were allowed an appeal to this court, upon filing their bond and bill of exceptions. Apparently that appeal was not perfected and on July 14, 1926 plaintiffs sued out a writ of error from this court making Armour Mechanical Company the sole defendant in error.

The defendant contends that the order which is sought to be reversed by this writ of error is not a final order, and, therefore, the writ of error will not lie but should be dismissed. We think it clear that this contention must be sustained. Sec. 91 of Chap. 110 of our statutes provides that "Appeals shall lie to and writs of error from the Appellate or Supreme Court, as may be allowed by law, to review the final judgments, orders or decrees of any of the Circuit Courts, the Superior Court of Cook County, the County Courts or the City Courts and other courts from which appeals and to which writs of error may be allowed by law." And the Municipal Court Act provides only for the review by appeal or writ of error of final orders, judgments or decrees. It is obvious that the case is still pending and at issue in the Municipal Court as to the other ten defendants. Furthermore it is not disposed of as to the Armour Mechanical Company, because the order merely quashed the service of the summons as to that defendant, but the suit was not dismissed as to it. But even if we assume that there

Company. The service having been quashed as to it, plaintiff moved the court for a default and judgment against it for want of appearance and affidavit of merits, this was denied, and it is obvious there was no basis for this motion because the service as to the Armour Mechanical Company had been quashed. The plaintiffs thereupon prayed for and were allowed an appeal to this court, upon filing their bond and bill of exceptions. Apparently that appeal was not perfected and on July 14, 1888 plaintiffs sued out a writ of error from this court making Armour Mechanical Company the sole defendant in error.

The defendant contends that the order which is sought to be reversed by this writ of error is not a final order, and, therefore, the writ of error will not lie but should be dismissed. We think it clear that this contention must be sustained. Sec. 91 of Chap. 110 of our statutes provides that "Appeals shall lie to such writs of error from the Appellate or Supreme Court, as may be allowed by law, to review the final judgments, orders or decrees of any of the Circuit Courts, the Superior Court of Cook County, the County Courts or the City Courts and other courts from which appeals and to which writs of error may be allowed by law." And the Municipal Court Act provides only for the review by appeal or writ of error of final orders, judgments or decrees. It is obvious that the case is still pending and at issue in the Municipal Court as to the other two defendants. Furthermore it is not disposed of as to the Armour Mechanical Company, because the order merely quashed the service of the summons as to that defendant, but the suit was not dismissed as to it. But even if we assume that there

was a final disposition of the case as to the Armour Mechanical Company, the writ of error would have to be dismissed because the law does not permit the review of a case by piecemeal by the Appellate or Supreme Court. In People v. Banks, 285 Ill. 137, it was held that where a bill was dismissed as to one or more of the parties for want of equity and the case remained pending as to the other parties, the complainant could not prosecute a writ of error until there was a final disposition of the case as to all of the parties, and that if a writ of error were sued out before a final decree or disposition of the cause as to all parties , it should be dismissed by the court on its own motion. The court there said (p.140) "The decree in this case that we are asked to reverse on this writ of error is not a final decree. This court has frequently held that if a bill is dismissed as to one or more parties for want of equity and the case still remains pending as to other parties, the complainant cannot prosecute a writ of error until there has been a final decree or disposition of the case as to all of the other parties. The reason is that such decree is not a final decree within the meaning of our Practice Act, and this court has therefore no jurisdiction to review it. Under such circumstances this court will dismiss the writ of its own motion. (Bucklen v. City of Chicago, 166 Ill. 451) * * * While there are exceptions to the rule that this court will not review a decree under the circumstances here presented, yet it is clear from the decisions already cited that this case does not come within the exceptions but is one that should not be reviewed on writ of error until it is disposed of as to all of the parties."

was a final disposition of the case as to the Armour Mechanical Company, the writ of error would have to be dismissed because the law does not permit the review of a case by piecemeal by the Appellate or Supreme Court. In People v. Burke, 288 Ill. 187, it was held that where a bill was dismissed as to one or more of the parties for want of equity and the case remained pending as to the other parties, the complainant could not prosecute a writ of error until there was a final disposition of the case as to all of the parties, and that if a writ of error were sued out before a final decree or disposition of the cause as to all parties , it should be dismissed by the court on its own motion. The court there said (p.190) "The decree in this case that we are asked to reverse on this writ of error is not a final decree. This court has frequently held that if a bill is dismissed as to one or more parties for want of equity and the case still remains pending as to other parties, the complainant cannot prosecute a writ of error until there has been a final decree or disposition of the case as to all of the other parties. The reason is that such decree is not a final decree within the meaning of our Practice Act, and this court has therefore no jurisdiction to review it. Under such circumstances this court will dismiss the writ of its own motion. (Burkley v. City of Chicago, 188 Ill. 481) * * * While there are exceptions to the rule that this court will not review a decree under the circumstances here presented, yet it is clear from the decisions already cited that this case does not come within the exceptions but is one that should not be reviewed on writ of error until it is disposed of as to all of the parties."

In the Bucklen case cited by the court in the Banks case, it was stated that an appeal from an order of court which was not final will be dismissed in the absence of any showing that particular hardship will result from such dismissal. In the instant case there is no suggestion that any particular hardship will result unless this writ of error is passed upon by us upon its merits, and we cannot see how such a suggestion could be seriously urged.

The order sought to be reversed by the prosecution of this writ of error not being final, the writ of error is dismissed.

WRIT DISMISSED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

In the Bowlder case cited by the court in the Davis case, it was stated that an appeal from an order of court which was not final will be dismissed in the absence of any showing that particular hardship will result from such dismissal. In the instant case there is no suggestion that any particular hardship will result unless this writ of error is passed upon by us upon its merits, and we cannot see how such a suggestion could be seriously urged.

The order sought to be reversed by the prosecution of this writ of error not being final, the writ of error is dismissed.

WRIT DISMISSED.

TAYLOR, P.J. AND WOMACK, J., CONCUR.

98 - 31224

ELIZABETH DURKIN, Appellant, v. EDWARD A. LIGHTFOOT, Appellee.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

Opinion filed March 2, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover damages for personal injuries. There was a verdict and judgment in defendant's favor and plaintiff appeals.

The record discloses that about 4:00 P.M. August 17, 1924, as plaintiff was alighting from a southbound street car in Vincennes Avenue at 91st Street she was struck and severely injured by defendant's automobile which was being driven north in Vincennes Avenue.

It appears from the evidence that Vincennes Avenue at the place in question runs north and south and 91st Street east and west; 91st Street intersects Vincennes Avenue on the west, but does not extend east of that street. There is a double line of street car tracks on the east side of the roadway on Vincennes Avenue. The roadway for other traffic is west of the two street car tracks. There is a space between the west street car track and the pavement three feet seven inches in width. West of that space is a pavement which is 19 feet,

ELIZABETH DUNLIE,

Appellant,

v.

ISAAC A. LIGHTNER,

Appellee.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

Opinion filed March 8, 1897.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover damages for personal injuries. There was a verdict and judgment in defendant's favor and plaintiff appeals.

The record discloses that about 4:00 P.M. August 17, 1894, as plaintiff was alighting from a southbound street car in Vincennes Avenue at 91st Street she was struck and severely injured by defendant's automobile which was being driven north in Vincennes Avenue.

It appears from the evidence that Vincennes Avenue at the place in question runs north and south and 91st Street east and west; 91st Street intersects Vincennes Avenue on the west, but does not extend east of that street. There is a double line of street car tracks on the east side of the roadway on Vincennes Avenue. The roadway for other traffic is west of the two street car tracks. There is a space between the west street car track and the pavement three feet seven inches in width. East of that space is a pavement which is 12 feet

7 inches in width. This latter part of the street is used for vehicular traffic. The evidence shows that plaintiff, a woman about twenty-six years of age, was riding south in a street car which was operated on the west track in Vincennes avenue. It was a bright clear day. She was to alight from the street car at 91st street, and as the car approached that intersection, it slowed down and came to a stop at the usual place - the north side of 91st street, and plaintiff alighted from the rear or north end of the street car. As the street car was approaching 91st street a Ford coupe was being driven north on the east side of the roadway of Vincennes avenue and when the driver of that automobile saw that the street car coming from the north, was going to stop near the north intersection of 91st street he slowed down and stopped near the south intersection of 91st street so that when the automobile came to a stop it was about fifteen feet south of the south end of the street car. The driver of the Ford saw that there was no one in the street to board the street car and therefore, knew that the street car was stopping to discharge passengers, and that such passengers would necessarily, in going to the west side of the street, pass across the pavement in front of his car. The evidence further shows that defendant was driving north in Vincennes avenue some short distance behind the Ford and as he overtook the Ford, which was stopped at the south side of 91st street, he swung his automobile to the west and passed around the Ford and as he did so, the right front fender of his automobile came in contact with plaintiff throwing her to the ground and severely injuring her.

7 inches in width. This latter part of the street is used for vehicular traffic. The evidence shows that plaintiff, a woman about twenty-six years of age, was riding south in a street car which was operated on the west track in Vincennes avenue. It was a bright clear day. She was to alight from the street car at Pilot street, and as the car approached that intersection, it slowed down and came to a stop at the usual place - the north side of Pilot street, and plaintiff alighted from the rear of north end of the street car. As the street car was approaching Pilot street a Ford coupe was being driven north on the east side of the roadway of Vincennes avenue and when the latter of that automobile saw that the street car coming from the north, was going to stop near the north intersection of Pilot street he slowed down and stopped near the south intersection of Pilot street so that when the automobile came to a stop it was about fifteen feet south of the south end of the street car. The driver of the Ford saw that there was no one in the street to board the street car and therefore, knew that the street car was stopping to discharge passengers, and that such passengers would necessarily, in going to the west side of the street, pass across the pavement in front of his car. The evidence further shows that defendant was driving north in Vincennes avenue some short distance behind the Ford and as he overtook the Ford, which was stopped at the south side of Pilot street, he swung his automobile to the west and passed around the Ford and as he did so, the right front fender of his automobile came in contact with plaintiff throwing her to the ground and severely injuring her.

The evidence further shows that when plaintiff alighted from the street car she looked to the south and to the north before proceeding west across the street. She saw the Ford coming from the south and saw it come to a stop. The driver of that car then signalled, by a nod of his head, for her to proceed westward across the street. At that time the street car had just started up. Upon receiving the signal, she started and was somewhere near the center of the roadway when she was struck by the defendant's automobile as above stated. The man who was driving the Ford automobile and his wife who was riding with him and two men who were operating a oil filling station near the northwest corner of the street intersection and plaintiff, herself, testified substantially as above stated. Plaintiff also testified that she did not see defendant's automobile until she was struck. Some of these witnesses also testified that defendant's automobile in passing around the Ford and when it struck plaintiff was traveling at the rate of fifteen to twenty miles per hour.

Defendant and his sister-in-law, who was with him in the car at the time, testified on behalf of the defendant. Their testimony was to the effect that as they were approaching 91st street from the south they saw the Ford automobile stopped in the roadway ahead of them and that the street car passed the defendant's automobile before defendant had reached the Ford car; that upon overtaking the Ford car, which was standing in the street, defendant shifted his car into second gear and proceeded to pass around the Ford at about ten miles per hour and as he did so plaintiff walked into the right front fender of his automobile. They both

The evidence further shows that when plaintiff alighted from the street car she looked to the south and to the north before proceeding west across the street. She saw the Ford coming from the south and saw it come to a stop. The driver of that car then signalled, by a nod of his head, her her to proceed westward across the street. At that time the street car had just started up. Upon receiving the signal, she started and was somewhere near the center of the roadway when she was struck by the defendant's automobile as above stated. The man who was driving the Ford automobile and his wife who was riding with him and two men who were operating a oil filling station near the northwest corner of the street intersection and plaintiff, herself, testified substantially as above stated. Plaintiff also testified that she did not see defendant's automobile until she was struck. Some of these witnesses also testified that defendant's automobile in passing around the Ford and when it struck plaintiff was travelling at the rate of fifteen to twenty miles per hour.

Defendant and his sister-in-law, who was with him in the car at the time, testified on behalf of the defendant. Their testimony was to the effect that as they were approaching first street from the south they saw the Ford automobile stopped in the roadway ahead of them and that the street car passed the defendant's automobile before defendant had reached the Ford car; that upon overtaking the Ford car, which was standing in the street, defendant shifted his car into second gear and proceeded to pass around the Ford at about ten miles per hour and as he did so plaintiff walked into the right front fender of his automobile. They both

testified that they never saw plaintiff until she struck the fender. All of the witnesses testified that the motorman and conductor of the street car came back to the place where plaintiff was injured and that she was taken in an ambulance to a hospital.

This is substantially all the evidence as to how the accident occurred and plaintiff contends that the finding of the jury in favor of the defendant is against the manifest weight of the evidence and we are clearly of the opinion that this contention must be sustained. There is little or no dispute in the evidence and in our opinion it clearly shows that the defendant was negligent in driving around the Ford which had stopped in front of him, and we are also of the opinion that there is little or no evidence tending to show that plaintiff was guilty of any negligence. The only dispute in the evidence was to the position of the street car when defendant's automobile passed around the Ford. Plaintiff's witnesses gave testimony to the effect that it was just passing the Ford, while the defendant's witnesses testified to the effect that it was a little farther south, but we are of the opinion that the version as testified to by plaintiff's witnesses is more in accordance with the fact, because all of the witnesses testified that the street car men came back to the place where plaintiff was struck.

Plaintiff also contends that the court erred in giving instructions Nos. 9, 10, 13, 14, 15, 17 and 18, on behalf of the defendant. Instruction 9 told the jury that the burden was on plaintiff "to prove that the defendant

testified that they never saw plaintiff until she struck the fender. All of the witnesses testified that the motorcycle and conductor of the street car came back to the place where plaintiff was injured and that she was taken in an ambulance to a hospital.

Made as substantially all the evidence as to how the accident occurred and plaintiff contends that the finding of the jury in favor of the defendant is against the manifest weight of the evidence and we are clearly of the opinion that this contention must be sustained. There is little or no dispute in the evidence and in our opinion it clearly shows that the defendant was negligent in driving around the ford which had stopped in front of him, and we are also of the opinion that there is little or no evidence tending to show that plaintiff was guilty of any negligence. The only dispute in the evidence was to the position of the street car when defendant's automobile passed around the ford. Plaintiff's witnesses give testimony to the effect that it was just passing the ford, while the defendant's witnesses testified to the effect that it was a little farther south, but we are of the opinion that the version as testified to by plaintiff's witnesses is more in accordance with the fact, because all of the witnesses testified that the street car man came back to the place where plaintiff was struck.

Plaintiff also contends that the court erred in giving instructions nos. 9, 10, 12, 14, 16, 17 and 18, on behalf of the defendant. Instruction 9 told the jury that the burden was on plaintiff to prove that the defendant

is guilty and also to prove that she was in the exercise of ordinary care for her own safety." We think this instruction should have required plaintiff to prove that defendant was guilty as charged in the declaration and that she was in the exercise of ordinary care for her own safety at and before the time of the injury by a preponderance of the evidence. By instruction No. 10 the jury were told that plaintiff was required to prove, by a preponderance of the evidence, "that the cause of the alleged injury was the negligence of the defendant as charged in his declaration." The jury might have been misled because the defendant had filed no declaration. Obviously the word should have been "her". Instruction 13 directed a verdict and was inaccurate in a number of particulars. It told the jury that if they believed from the evidence that the plaintiff failed to exercise ordinary care for her own safety and that such failure, if the jury believed there was such failure, "helped in any way to bring about the accident" she could not recover. This instruction should have been given. Plaintiff was required to show that she was in the exercise of ordinary care for her own safety at and before the time she was injured and this must be shown by plaintiff by a preponderance of the evidence. The phrase "helped in any way" should have been eliminated as it is inaccurate. Plaintiff could not be barred from a recovery on account of any negligence on her part unless such negligence proximately contributed to the injury. Instruction No. 14 told the jury, among other things, that if they believed from the evidence that the defendant exercised ordinary care to avoid the injury, plaintiff could not recover. There was no evidence

in quilty and aim to prove that she was in the exercise of ordinary care for her own safety." We think this instruction should have required plaintiff to prove that defendant was guilty as charged in the declaration and that she was in the exercise of ordinary care for her own safety at and before the time of the injury by the preponderance of the evidence. By instruction No. 10 the jury were told that plaintiff was required to prove, by a preponderance of the evidence, "that the cause of the alleged injury was the negligence of the defendant as charged in his declaration." The jury might have been misled because the defendant had filed no declaration. Obviously the word should have been "her". Instruction 13 directed a verdict and was inaccurate in a number of particulars. It told the jury that if they believed from the evidence that the plaintiff failed to exercise ordinary care for her own safety and that such failure, if the jury believed there was such failure, "helped in any way to bring about the accident" she could not recover. This instruction should have been given. Plaintiff was required to show that she was in the exercise of ordinary care for her own safety at and before the time she was injured and this must be shown by plaintiff by a preponderance of the evidence. The phrase "helped in any way" should have been eliminated as it is inaccurate. Plaintiff could not be barred from a recovery on account of any negligence on her part unless such negligence proximately contributed to the injury. Instruction No. 14 told the jury, among other things, that if they believed from the evidence that the defendant exercised ordinary care to avoid the injury, plaintiff could not recover. There was no evidence

tending to show that the defendant did anything to avoid striking plaintiff, because the evidence all shows that he did not see her until she was struck. Instruction No. 15 was to the effect that if plaintiff's negligence caused or contributed to producing the injury she could not recover. As stated it omitted the element that her negligence proximately contributed to bringing about her injuries. Instruction 17 was apt to be misleading. By it the jury were told that the law of contributory negligence forbids a recovery by one who by his own fault brings an injury upon himself. The jury might understand that there was an implied assumption that plaintiff was injured through her own fault and this same idea was emphasized in the last part of the instruction, which said that it was not a question of comparison "as to who was most at fault." Instruction 18 told the jury that contributory negligence meant the doing of some negligent act by a party injured which contributed to "or helps to bring about" the injury. It omitted the element that the negligent act must proximately contribute to bringing about the injury and the word "helps" was improper in any view.

The judgment of the Superior Court of Cook County is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

tending to show that the defendant did anything to avoid striking plaintiff, because the evidence all shows that he did not see her until she was struck. Instruction No. 15 was to the effect that if plaintiff's negligence caused or contributed to producing the injury she could not recover. As stated it omitted the element that her negligence proximately contributed to bringing about her injuries. Instruction 17 was apt to be misleading. By it the jury were told that the law of contributory negligence forbids a recovery by one who by his own fault brings an injury upon himself. The jury might understand that there was an implied assumption that plaintiff was injured through her own fault and this same idea was emphasized in the last part of the instruction, which said that it was not a question of comparison "as to who was most at fault." Instruction 18 told the jury that contributory negligence meant the doing of some negligent act by a party injured which contributed to "or helps to bring about" the injury. It omitted the element that the negligent act must proximately contribute to bringing about the injury and the word "helps" was improper in any view.

The judgment of the Superior Court of Cook County is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

106 - 31235

BISHOP-WYATT COMPANY, a corporation, Appellant, v. J. R. LUDWIG, Appellee.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

Opinion filed March 2, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of assumpsit against the defendant claiming $1388.45, being $1000.00 loan and the balance due for commissions paid by plaintiff to the defendant which had not been earned by him. The case was tried before the court without a jury, there was a finding and judgment in defendant's favor and plaintiff appeals.

The record discloses that plaintiff and the defendant entered into a written agreement whereby the defendant was employed "to sell our 52 success thoughts and suggestions with portfolios and illustrated jim letter service." The contract further provided that defendant was to receive as compensation a commission of 40 percent of the net total on orders secured by him; that the commissions would become due when plaintiff had received payment in full from its customers; that plaintiff should furnish the defendant with a "drawing account on all contracts secured by you not to exceed seventy-five per cent (75%) of your earned commissions on contracts closed during the week in which the advance is

108 - 31235

KINNOP-WYATT COMPANY, a corporation, Appellant, v. J. E. LUDWIG, Appellee.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

Opinion filed March 5, 1937.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of assumpsit against the defendant claiming $1285.46, being $1000.00 loan and the balance due for commissions paid by plaintiff to the defendant which had not been earned by him. The case was tried before the court without a jury, there was a finding and judgment in defendant's favor and plaintiff appeals.

The record discloses that plaintiff and the defendant entered into a written agreement whereby the defendant was employed "to sell our BK success thoughts and suggestions with portfolios and illustrated jim letter service." The contract further provided that defendant was to receive as compensation a commission of 40 percent of the net total on orders secured by him; that the commissions would become due when plaintiff had received payment in full from its customers; that plaintiff should furnish the defendant with a "drawing account on all contracts secured by you but to exceed seventy-five per cent (75%) of your earned commissions on contracts closed during the week in which the advance is

made. Limit drawing account not to exceed One Hundred and Fifty Dollars ($150.00) in any one week. The balance of the commissions due you after advances as above outlined have been deducted shall be paid after we have received payment in full from the customers you sell."
It is further agreed that the Bishop-Wyatt Company will set aside or loan to you One Thousand Dollars ($1,000.00) which may be used to make up difference between earned commission and draw of $150.00 for each week."

After the contract was entered into, thedefendant went to work as required by the contract and earned commissions amounting to $4490.87. During this period some thirty odd weeks, plaintiffs had advanced to the defendant $150.00 a week until such advance reached the sum of $1000.00 when such advances were discontinued. Plaintiffs also paid to the defendant during this period of time as and for the commissions which he had earned $4879.32. So that the defendant had received from the plaintiff in all $5879.32, while he had earned as commissions $4490.87, and the difference between these two sums $1388.45, plaintiffs sought to recover in the instant case.

Plaintiffs' declaration consisted of special counts and the common counts and a copy of the account and affidavit of claim was filed with the declaration. This sets up in detail the business done by the defendant for the plaintiff, the charges made and the commissions earned, etc. The defendant filed the general issue and affidavit of merits, but there was no contention made by the defendant that the account and affidavit claim filed by the defendant was inaccurate in any

made. Limit drawing account not to exceed One Hundred and Fifty Dollars ($150.00) in any one week. The balance of the commissions due you after advances as above outlined have been deducted shall be paid after we have received payment in full from the customers you sell."

It is further agreed that the Kinney-Lyons Company will act made or loan to you One Thousand Dollars ($1,000.00) which may be used to make up difference between earned commission and draw of $150.00 for each week."

After the contract was entered into, the defendant went to work as required by the contract and earned commissions amounting to $4490.87. During this period some thirty odd weeks, plaintiffs had advanced to the defendant $150.00 a week until such advance reached the sum of $1000.00 when such advances were discontinued. Plaintiffs also paid to the defendant during this period of time as and for the commissions which he had earned $687.32. So that the defendant had received from the plaintiff in all $687.32, while he had earned as commissions $4490.87, and the difference between these two sums $3803.45, plaintiffs sought to recover in the instant case.

Plaintiffs' declaration consisted of special counts and the common counts and a copy of the account and affidavit of claim was filed with the declaration. This sets up in detail the business done by the defendant for the plaintiff, the charges made and the commissions earned, etc. The defendant filed the general issue and affidavit of merits, but there was no contention made by the defendant that the account and affidavit claim filed by the defendant was inaccurate in any

respect. The defendant's position was that after the parties had entered into the written agreement, defendant's duties were changed so that he was required to spend more money in the prosecution of the plaintiffs' business than would have been required had the written contract remained unchanged. The court expressly found from the evidence that no such change in the contract had been made. The court further held as a matter of law that the defendant was not obligated to repay the $1000.00 or any part thereof that had been advanced by plaintiff to the defendant, because the contract did not so provide. In this we think the court was clearly right. The substance of the contract was that the defendant was to receive 40 percent commissions on the contracts he had obtained, on moneys received by plaintiff on these contracts from its customers, and that plaintiffs would advance defendant $150.00 a week as a drawing account up to the sum of $1000.00. This is the testimony of plaintiffs' president. The contract then provided that after applying the $150.00 per week advanced, on the commissions earned, the balance of the commissions would be paid by plaintiff to the defendant. There was no provision that the $150.00 per week advances or any part thereof should be refunded in case the commissions did not equal that sum. It has been held in such case that in the absence of an express agreement to pay back amounts advanced to an employee in anticipation of expected commissions, or words in the contract showing the employee to be personally liable to repay such advancements, they are not to be treated as loans and the employee is not liable to repay his employer in case the commissions did not amount to as much as the

respect. The defendant's position was that after the parties had entered into the written agreement, defendant's duties were changed so that he was required to spend more money in the prosecution of the plaintiffs' business than would have been required had the written contract remained unchanged. The court expressly found from the evidence that no such change in the contract had been made. The court further held as a matter of law that the defendant was not obligated to repay the $1000.00 or any part thereof that had been advanced by plaintiff to the defendant, because the contract did not so provide. In this we think the court was clearly right. The substance of the contract was that the defendant was to receive 40 percent commissions on the contracts he had obtained, on moneys received by plaintiff on these contracts from its customers, and that plaintiffs would advance defendant $150.00 a week as a drawing account up to the sum of $1000.00. This is the testimony of plaintiffs' president. The contract then provided that after applying the $150.00 per week advanced, on the commissions earned, the balance of the commissions would be paid by plaintiff to the defendant. There was no provision that the $150.00 per week advances or any part thereof should be refunded in case the commissions did not equal that sum. It has been held in each case that in the absence of an express agreement to pay back amounts advanced to an employee in anticipation of expected commissions, or words in the contract showing the employee to be personally liable to repay such advancements, they are not to be treated as loans and the employee is not liable to repay this employer in case the commissions did not amount to as much as the

advances. Felsenthal Bros. & Co. v. Gradwohl, 217 Ill. App. 170; Nelson v. American Business Bureau, 241 Ill. App. 432, and authorities cited in those two cases. The fact that the written contract states that plaintiff "will set aside or loan" the defendant $1000.00 to be used to make up the difference between his earned commissions and $150.00 a week, does not change the situation. The $1000.00 advanced, as disclosed by the record, cannot be considered a loan, because the contract provided that after the advancement to the defendant of $150.00 a week, the balance of the defendant's commission over and above this sum of $150.00 per week would be paid by plaintiff to the defendant when the commission should have been collected by plaintiff.

The undisputed evidence in the record, however, is that plaintiff had paid the defendant for commissions $632.50 more than the defendant was entitled to receive. This was brought about by the fact that plaintiff was unable to collect the full contract prices from some of its customers. The statement of the account filed by plaintiff showed that the amount of these over-payments was $672.50, but on the trial a witness for the plaintiff testified that since the account had been made up, plaintiff had collected $100.00 more, and that the defendant would therefore, be entitled to $40.00 commission. This $40.00 deducted from the $672.40 leaves a balance of $632.40. This is money which the defendant had received from the plaintiff which in equity and good conscience he ought not to retain, and under the common counts filed by plaintiff, the plaintiff is entitled to recover this sum. No suggestion was made to this effect on the trial nor

advances. Triestrial Wines & Co. v. Inglewood, 21 Ill. App. 170; Nelson v. American Insurance Company, 24 Ill. App. 482, and authorities cited in those two cases. The fact that the written contract states that plaintiff "will set aside or loan" the defendant $1000.00 to be used to make up the difference between his earned commissions and $150.00 a week, does not change the situation. The $1000.00 advanced, as disclosed by the record, cannot be considered a loan, because the contract provided that after the advancement to the defendant of $150.00 a week, the balance of the defendant's commission over and above this sum of $150.00 per week would be paid by plaintiff to the defendant when the commission should have been collected by plaintiff.

The much quoted evidence in the record, however, is that plaintiff had paid the defendant for commissions $223.50 more than the defendant was entitled to receive. This was brought about by the fact that plaintiff was unable to collect the full contract prices from some of its customers. The statement of the account filed by plaintiff showed that the amount of these over-payments was $273.50, but on the trial a witness for the plaintiff testified that since the account had been made up, plaintiff had collected $100.00 more, and that the defendant would therefore, be entitled to $40.00 commission. This $40.00 deducted from the $273.40 leaves a balance of $233.40. This is money which the defendant had received from the plaintiff which in equity and good conscience he ought not to retain, and under the common counts filed by plaintiff, the plaintiff is entitled to recover this sum. No suggestion was made to this effect on the trial nor

is there any such suggestion made in this court, but upon a consideration of the record, we think plaintiff ought to be given a judgment for the $632.40, there being no dispute in the evidence, as to the over-payment.

The judgment of the Circuit Court of Cook County is reversed with a finding of fact and judgment will be entered in this court in favor of plaintiff and against the defendant for $632.40. Each party will be required to pay its or his own cost in this court.

JUDGMENT REVERSED WITH A FINDING OF FACT AND JUDGMENT ENTERED IN THIS COURT.

FINDING OF FACT: We find as an ultimate fact that plaintiff has overpaid the defendant $632.40.

THOMSON, J. CONCURS;
TAYLOR, J. DISSENTS.

is there any such suggestion made in this court, but upon a consideration of the record, we think plaintiff ought to be given a judgment for the $222.40, there being no dispute in the evidence, as to the over-payment.

The judgment of the Circuit court of Cass County is reversed with a finding of fact and judgment will be entered in this court in favor of plaintiff and against the defendant for $222.40. Each party will be required to pay its or his own cost in this court.

JUDGMENT REVERSED WITH A FINDING OF FACT AND JUDGMENT ENTERED IN THIS COURT.

FINDING OF FACT: We find as an ultimate fact that plaintiff has overpaid the assessment $222.40.

DUNCAN, J. CONCURS;
TAYLOR, J. DISSENTS.

116 - 31244

L. VOGEL AND S. KOHN, co-partners, trading as VOGEL & KOHN, Appellants, v. L. A. GRIFFIN AND J. BENNON, co-partners, trading as BENNON-GRIFFIN CO., Appellees.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

Opinion filed March 2, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action against the defendant before a justice of the peace in the town of Cicero, and had a judgment by default of $109.50. The defendant appealed to the Circuit Court of Cook County, and when the case was reached for trial on March 25, 1926, the record discloses, that plaintiffs failed to prosecute their suit and, on motion of the defendants' attorney, it was dismissed at plaintiffs' costs for want of prosecution. Five days later counsel for plaintiffs served notice on counsel for the defendant that they would appear the following day and move the court to vacate and set aside the order of dismissal and ask that the cause be re-instated and in support of that motion an affidavit was made by one of plaintiffs' counsel. The court heard the matter on March 31st, denied the motion and plaintiff appeals. So that the only question before us is did the court abuse its discretion in denying the motion.

A. VOGEL AND S. ROHR, co-partners, trading as VOGEL & ROHL, Appellants,	
v.	CIRCUIT COURT,
L. A. CHUTKIN AND J. MEYROWITZ, co-partners, trading as MEYROW-CHUTKIN CO., Appellees.	COOK COUNTY.

Opinion filed March 3, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action against the defendant before a justice of the peace in the town of Maeroy, and had a judgment by default of $108.50. The defendant appealed to the Circuit Court of Cook County, and when the case was reached for trial on March 23, 1926, the record discloses, that plaintiffs failed to prosecute their suit and, on motion of the defendants' attorney, it was dismissed at plaintiffs' costs for want of prosecution. Five days later counsel for plaintiffs served notice on counsel for the defendant that they would appear the following day and move the court to vacate and set aside the order of dismissal and ask that the cause be re-instated and in support of that motion an affidavit was made by one of plaintiffs' counsel. The court heard the matter on Motion filed, denied the motion and plaintiff appeals. So that the only question before us is did the court abuse its discretion in denying the motion.

The only matter the court had before it on this motion, was the affidavit of one of plaintiffs' counsel; that affidavit sets up that the affiant was assigned to conduct the trial on behalf of the plaintiff; that on March 25, 1926, when the cause was on the trial call he appeared in court and at that time requested the said cause to be held until 2:30 o'clock P.M. of that day, for the reason that at the hour of 2:00 o'clock on said day, affiant was scheduled to appear before Judge Friend in a foreclosure case, in which case there was a motion for the appointment of a receiver set for 2:00 o'clock; that at that time the motion was called before Judge Friend and that counsel was there engaged until 3:00 o'clock in the afternoon; that immediately upon that matter being disposed of before Judge Friend, he went to Judge Swanson's court, where the matter in question was pending, and then learned that the cause had been dismissed "at 2:30 o'clock P.M. or shortly thereafter for want of prosecution," and that affiant was actually engaged before Judge Friend at the time of the dismissal. We think the affidavit was clearly insufficient. It does not state that when counsel for plaintiffs appeared in court on the morning the case was set for trial before Judge Swanson, and requested that it be held until 2:30 o'clock of that day, that the court agreed to this request. For aught that appears the court might have denied the request. However, counsel in their briefs state that when the matter came on for hearing at 10:00 o'clock before Judge Swanson counsel for plaintiffs appeared and made a request as above stated, and that the court "granted said leave." But as we have said,

The only matter the court had before it on this motion, was the affidavit of one of plaintiffs' counsel; that affidavit sets up that the affiant was engaged to conduct the trial on behalf of the plaintiff; that on March 25, 1938, when the cause was on the trial call he appeared in court and at that time requested the said cause to be held until 3:30 o'clock P.M. of that day, for the reason that at the hour of 3:00 o'clock on said day, affiant was scheduled to appear before Judge Friend in a foreclosure case, in which case there was a motion for the appointment of a receiver set for 3:00 o'clock; that at that time the motion was called before Judge Friend and that counsel was there engaged until 3:00 o'clock in the afternoon; that immediately upon that matter being disposed of before Judge Friend, he went to Judge Swanson's court, where the matter in question was pending, and then learned that the cause had been dismissed "at 2:30 o'clock P.M. or shortly thereafter for want of prosecution," and that affiant was actually engaged before Judge Friend at the time of the dismissal. We think the affidavit was clearly insufficient. It does not state that when counsel for plaintiffs appeared in court on the morning the case was set for trial before Judge Swanson, and requested that it be held until 2:30 o'clock of that day, that the court agreed to this request. For aught that appears the court might have denied the request. However, counsel in their brief state that when the matter came on for hearing at 10:00 o'clock before Judge Swanson counsel for plaintiffs appeared and made a request as above stated, and that the court "granted said leave." But as we have said,

this does not appear in the affidavit filed by counsel. Moreover, even if the court had granted leave and had stated the case would be held until 2:30 o'clock, the affidavit further shows that counsel did not appear before Judge Swanson until after 3:00 o'clock and that the cause was dismissed at "2:30 o'clock or shortly thereafter."

For failure to make a sufficient showing in the affidavit, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

TAYLOR, P.J. and THOMSON, J. CONCUR.

this does not appear in the affidavit filed by counsel. Moreover, even if the court had granted leave and had stated the case would be held until 3:30 o'clock, the affidavit further shows that counsel did not appear before Judge Swanson until after 3:00 o'clock and that the cause was dismissed at "4:00 o'clock or nearly thereafter."

For failure to make a sufficient showing in the affidavit, the judgment of the Lemmle Court of Oak County is affirmed.

AFFIRMED.

TAYLOR, P.J., and TRAMMELL, J., concur.

72 - 30888

CHARLES O'LEARY,
Plaintiff in Error,

v.

COMMISSIONERS OF LINCOLN PARK,
Defendant in Error.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

Opinion filed March 2, 1927.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff O'Leary brought this action in assumpsit against the Commissioners of Lincoln Park, a corporation, to recover salary to which he alleged he was entitled, as a Civil Service employee, from March 31, 1921, to the date on which he started his suit. The plaintiff filed a declaration consisting of the common counts and a special count in which he set out the various steps by means of which he came to be appointed to the office of time-keeper, pursuant to civil service examination, and performed the duties of that office from April 1916 until March 31, 1921, since which time he alleged he had not been permitted to occupy the office nor receive the salary appropriated for its incumbent; that on the last mentioned date the defendant pretended to abolish the office and so notified the plaintiff, but the plaintiff alleged that said office was not in fact abolished, but on the following day, one Schmidt was illegally appointed by the defendant, to this same office, which the plaintiff had heretofore occupied, with the same duties attaching thereto; the defendant having

CHARLES O'LEARY,

Plaintiff in Error,

v.

COMMISSIONERS OF LINCOLN PARK,

Defendant in Error.

ERROR TO

CIRCUIT COURT

COOK COUNTY.

Opinion filed March 2, 1927.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff O'Leary brought this action in assumpsit against the Commissioners of Lincoln Park, a corporation, to recover salary to which he alleged he was entitled, as a Civil Service employee, from March 31, 1921, to the date on which he started his suit. The plaintiff filed a declaration consisting of the common counts and a special count in which he set out the various steps by means of which he came to be appointed to the office of time-keeper, pursuant to civil service examination, and performed the duties of that office from April 1916 until March 31, 1921, since which time he alleged he had not been permitted to occupy the office nor receive the salary appropriated for its incumbent; that on the last mentioned date the defendant pretended to abolish the office and so notified the plaintiff, but the plaintiff alleged that said office was not in fact abolished, but on the following day, one Schmidt was illegally appointed by the defendant, to this same office, which the plaintiff had heretofore occupied, with the same duties attaching thereto; the defendant having

illegally changed the name of the office to "assistant foreman". It was further alleged that the defendant had made the usual appropriations for the office of time-keeper; that no charges had been preferred against the plaintiff and he had always stood ready, willing and able to perform the services and duties of a time-keeper, but the defendant had refused to permit him to perform such duties since March 31,1921.

The defendant filed a number of special pleas, one of which was to the effect that the office of time-keeper which the plaintiff had previously occupied had been abolished on March 9, 1921, and that the plaintiff had never made any effort, by the filing of a petition for mandamus or in any other manner, to review, vacate or set aside the order abolishing said office or to establish his right thereto. The plaintiff demurred to this plea and filed replications to the other pleas. The court refused to sustain the plaintiff's demurrer to this third plea and carried the demurrer back to the special count of the declaration above referred to, and sustained the demurrer to that count. The plaintiff elected to stand by his declaration, whereupon judgment was entered in favor of the defendant and against the plaintiff. To reverse that judgment the plaintiff has perfected this appeal. In the other special pleas and replications thereto the parties had joined issue on the question of whether the office of time-keeper had been in fact abolished, as claimed by the defendant but denied by the plaintiff.

In support of this appeal the plaintiff contends that there was no necessity of compelling the defendant, by mandamus, to restore him to the office of time-keeper because he had never

illegally changed the name of the office to "assistant foreman". It was further alleged that the defendant had made the usual appropriations for the office of time-keeper; that no charges had been preferred against the plaintiff and he had always stood ready, willing and able to perform the services and duties of a time-keeper, but the defendant had refused to permit him to perform such duties since March 31, 1921.

The defendant filed a number of special pleas, one of which was to the effect that the office of time-keeper which the plaintiff had previously occupied had been abolished on March 3, 1921, and that the plaintiff had never made any effort, by the filing of a petition for mandamus or in any other manner, to review, vacate or set aside the order abolishing said office or to establish his right thereto. The plaintiff demurred to this plea and filed replications to the other pleas. The court refused to sustain the plaintiff's demurrer to this third plea and carried the demurrer back to the special count of the declaration above referred to, and sustained the demurrer to that count. The plaintiff elected to stand by his declaration, whereupon judgment was entered in favor of the defendant and against the plaintiff. To reverse that judgment the plaintiff has perfected this appeal. In the other special pleas and replications thereto the parties had joined issue on the question of whether the office of time-keeper had been in fact abolished, as claimed by the defendant but denied by the plaintiff.

In support of this appeal the plaintiff contends that there was no necessity of compelling the defendant, by mandamus, to restore him to the office of time-keeper because he had never

been out of the office. In our opinion that contention is untenable. Whether the office had been abolished in fact or the defendanthad merely pretended to abolish it, the plaintiff by his own pleading shows that he had been out of it since March 31, 1921. It is of course true that the defendant has a right to discontinue any office or position in good faith, if it becomes no longer necessary or useful, but neither it nor its civil service board has any right to continue the position in force and remove the plaintiff therefrom until charges have been preferred against him and sustained by the civil service board in the manner provided by law. Nor can the defendant or its civil service board legally abolish an office or position temporarily for the unlawful purpose of later re-establishing it, either under the same or another name and installing some other person in it. People, ex rel Jacobs v. Coffin, 282 Ill. 599. But until one, finding himself in the position of this plaintiff, has established his right to the position or office involved either by mandamus or other proper proceeding, he is not in a position to sue the municipality, and recover his salary for the period he claims to have been illegally prevented from performing the duties of his position or office.

It was held in City of Chicago v. People ex rel Gray, 210 Ill. 84, that even where an ousted employee filed a petition for mandamus, seeking both to compel his reinstatement and the payment of his salary during the time he had been illegally prevented from performing his duties in his position it was obnoxious to demurrer in seeking two kinds of relief, one of which, namely, his reinstatement, must precede his right to the other, namely, the collection of his

been out of the office. In our opinion that contention is untenable. Whether the office had been abolished in fact or the defendant had merely proceeded to abolish it, the plaintiff by his own pleading shows that he had been out of it since March 31, 1921. It is of course true that the defendant has a right to discontinue any office or position in good faith, if it becomes no longer necessary or useful, but neither it nor its civil service board has any right to continue the position in force and remove the plaintiff therefrom until charges have been preferred against him and sustained by the civil service board in the manner provided by law. Nor can the defendant or its civil service board legally abolish an office or position temporarily for the unlawful purpose of later re-establishing it, either under the same or another name and installing some other person in it. People, ex rel Jacobs v. Griffin, 222 Ill. 599. But one, finding himself in the position of this plaintiff, until has established his right to the position or office involved either by mandamus or other proper proceeding, he is not in a position to sue the municipality, and recover his salary for the period he claims to have been illegally prevented from performing the duties of his position or office.

It was held in City of Chicago v. People ex rel Gray, 210 Ill. 84, that even where an ousted employee filed a petition for mandamus, seeking both to compel his reinstatement and the payment of his salary during the time he had been illegally prevented from performing his duties in his position it was obnoxious to demurrer in seeking two kinds of relief, one of which, namely, his reinstatement, must precede his right to the other, namely, the collection of his

back salary. Since that decision, however, it has come to be held that "no obstacle exists to the granting of complete relief in one proceeding." People v. Coffin, 279 Ill. 401; McArdle v. City of Chicago, 216 Ill. App. 343. The court held to the same effect in the People ex rel McDonnell v. Thompson, 316 Ill. 11.

The plaintiff shows by his own pleading that he was a civil service officer or employee. He was removed from his office or position by the Park Civil Service Board. Before he may be in a position to bring an action at law against the Commissioners of Lincoln Park, for salary following the date upon which he was ousted from his office or position, it would be necessary by appropriate proceedings to which the Civil Service Board would be a necessary party, to establish that the position or office still exists and that he is legally entitled to it, and has been, ever since the attempt was made to oust him from it. City of Chicago v. People ex rel Gray, supra; Gersch v. City of Chicago, 192 Ill. App. 190.

For the reasons stated, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

back salary. Since that decision, however, it has come to be held that "no obstacle exists to the granting of complete relief in one proceeding." People v. Griffin, 279 Ill. 401; McArdle v. City of Chicago, 316 Ill. App. 342. The court held to the same effect in the People ex rel McDonnell v. Thompson, 316 Ill. 11.

The plaintiff shows by his own pleading that he was a civil service officer or employee. He was removed from his office or position by the Park Civil Service Board. Before he may be in a position to bring an action at law against the Commissioners of Lincoln Park, for salary following the date upon which he was ousted from his office or position, it would be necessary by appropriate proceedings to which the Civil Service Board would be a necessary party, to establish that the position or office still exists and that he is legally entitled to it, and has been ever since the attempt was made to oust him from it. City of Chicago v. People ex rel Scott, supra; Gersch v. City of Chicago, 198 Ill. App. 190.

For the reasons stated, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

15 - 30930

32 - 31142

LEWIS-SIMAS-JONES COMPANY, Appellee, Defendant in Error, v. PETER PEERBOLTE, Appellant, Plaintiff in Error.	APPEAL FROM AND ERROR TO CIRCUIT COURT, COOK COUNTY.

Opinion filed March 2, 1927.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff company brought suit against the defendant Peerbolte to recover amounts due on three promissory notes executed by the defendant to the order of R. C. McGill & Co., and endorsed by the payee in blank.

When the case was first tried there was a directed verdict for the plaintiff; on appeal from that judgment by the defendant, this court held that the issues involved should have been submitted to the jury and, because they were not, the judgment was reversed and the cause remanded. Lewis-Simas-Jones Co. v. Peerbolte, 237 Ill. App. 647. The case was tried again and, on the second trial, the issues were submitted to a jury resulting in a finding for the plaintiff and an assessment of damages amounting to $8,451.13. Judgment was entered on that verdict against the defendant; the latter prayed an appeal but failed to file his complete record in this court within the time allowed; he then sued out

15 - 30920

39 - 31142

LEWIS-SIMAS-LANES COMPANY, Appellee,	
v.	Defendant in Error,
PETER PEARSOLTE, Appellant,	Plaintiff in Error,

Opinion filed March 3, 1927.

MR. JUSTICE MORRISON delivered the opinion of the court.

The plaintiff company brought suit against the defendant Pearsolte to recover amounts due on three promissory notes executed by the defendant to the order of R. E. McGill & Co., and endorsed by the payee in blank.

When the case was first tried there was a directed verdict for the plaintiff; on appeal from that judgment by the defendant, this court held that the issues involved should have been submitted to the jury and, because they were not, the judgment was reversed and the cause remanded. Lewis-Simas-Lanes Co. v. Pearsolte, 277 Ill. App. 647. The case was tried again and, on the second trial, the issues were submitted to a jury resulting in a finding for the plaintiff and an assessment of damages amounting to $8,451.15. Judgment was entered on that verdict against the defendant; the latter prayed an appeal but failed to file in complete record in this court within the time allowed; he then sued out

a writ of error to review the judgment and, upon his motion, the writ of error and appeal were consolidated for hearing in this court.

The evidence shows that a concern known as Peacock & Co.of Chicago, owed a balance of about $8,500 to R. C. McGill & Co. of San Francisco. Both of these concerns, as well as the defendant Peerbolte, were dealers in seeds and onion sets. In December, 1921 and January, 1922, McGill was in Chicago pressing Peacock for payment of that account. The business of Peacock & Co. was not doing well and they were not in a position to make anysubstantial payment on their account with McGill & Co. But, Peacock & Co. held two contracts each dated in April 1921, calling for the delivery of onion sets to Peacock & Co., in January and February 1922. One of these contracts was with Rau & Co. This called for the delivery of 10,000 bushels of onion sets at a dollar a bushel. The other contract with the Cooperative Onion Set Growers Association, of which the defendant Peerbolte was manager, called for the delivery of 11,000 bushels of onion sets at $1.10 a bushel and 3,000 bushels at $1.25 a bushel. Delivery was due Peacock & Co. under these contracts at about the time McGill was pressing for the payment of his account. At that time the price of onion sets had advanced to $1.50 and $1.60 a bushel.

After the plaintiff had introduced the notes in evidence, and submitted testimony as to the amount due upon them, thus making out its prima facie case, Peacock, testifying for the defendant, stated that he told McGill

a writ of error to review the judgment and, upon his motion, the writ of error and appeal were consolidated for hearing in this court.

The evidence shows that a concern known as Peacock & Co. of Chicago, owed a balance of about $8,800 to E. G. Merrill & Co. of San Francisco. Both of these concerns, as well as the defendant Peerboltz, were dealers in seeds and onion sets. In December, 1921 and January, 1922, Merrill was in Chicago pressing Peacock for payment of that account. The business of Peacock & Co. was not doing well and they were not in a position to make anysubstantial payment on their account with Merrill & Co. But, Peacock & Co. held two contracts each dated in April 1921, calling for the delivery of onion sets to Peacock & Co., in January and February 1922. One of these contracts was with Ban & Co. This called for the delivery of 10,000 bushels of onion sets at a dollar a bushel. The other contract with the Cooperative Union Set Growers Association, of which the defendant Peerboltz was manager, called for the delivery of 11,000 bushels of onion sets at $1.10 a bushel and 5,000 bushels at $1.85 a bushel. Delivery was due Peacock & Co. under these contracts at about the time Merrill was pressing for the payment of his account. At that time the price of onion sets had advanced to $1.80 and $1.80 a bushel.

After the plaintiff had introduced the notes in evidence, and submitted testimony as to the amount due upon them, then making out its prima facie case, Peacock, testifying for the defendant, stated that he told Merrill

about these contracts and suggested that if he would wait a little longer his company would be in a position to liquidate its account with McGill & Co. out of the profits on the onion sets called for by these two contracts, but McGill was anxious to get back to San Francisco and was unwilling to leave without some definite arrangement covering the payment of his account; that McGill suggested that they enter into some agreement concerning these contracts and he asked Peacock to produce them so that he could submit them to his lawyer for the preparation of such an agreement and that Peacock accordingly delivered the contracts to McGill for that purpose but without any endorsement or assignment by Peacock & Co. Peacock further testified that he never got anything from McGill for these contracts and that McGill did not credit anything on the indebtedness of Peacock & Co. in consideration of the delivery of the contracts, nor did he ever return them, but that about the middle of January, Peacock found that they had come into the hands of the defendant. He further testified that both Rau and the Cooperative Onion Set Growers Association made deliveries to Peacock & Co. under these two contracts.

The defendant Peerbolte testified that on January 18, 1922, McGill came to him with the Rau and Cooperative contracts, asking the defendant to handle the onion sets called for by the contracts and pay McGill the amount of the indebtedness of Peacock & Co., and divide any profit that might be made above the amount of that indebtedness between McGill and himself "fifty-fifty". Apparently, the parties made an agreement on that basis, figured the profit involved in the contracts over and above the indebtedness from Peacock

about these contracts and suggested that if he would wait a little longer his company would be in a position to liquidate its account with McGill & Co. out of the profits on the union cars called for by these two contracts, but McGill was anxious to get back to San Francisco and was unwilling to leave without some definite arrangement covering the payment of his account; that McGill suggested that they enter into some agreement concerning these contracts and he asked Peacock to produce them so that he could submit them to his lawyer for the preparation of such an agreement and that Peacock accordingly delivered the contracts to McGill for that purpose but without any endorsement or assignment by Peacock & Co. Peacock further testified that he never got anything from McGill for these contracts and that McGill did not credit anything on the indebtedness of Peacock & Co. in consideration of the delivery of the contracts, nor did he ever return them, but that about the middle of January, Peacock found that they had come into the hands of the defendant. He further testified that both Ran and the Cooperative Union Set Growers Association made deliveries to Peacock & Co. under these two contracts.

The defendant Peacock testified that on January 12, 1922, McGill came to him with the Ran and Cooperative contracts, asking the defendant to handle the union cars called for by the contracts and pay McGill the amount of the indebtedness of Peacock & Co., and divide any profit that might be made above the amount of that indebtedness between McGill and himself "fifty-fifty". Apparently, the parties made an agreement on that basis, figured the profit involved in the contracts over and above the indebtedness from Peacock

& Co. to McGill & Co., based on the then market price of the onion sets and, in consideration of the assignment of the contracts by McGill & Co. to Peerbolte, the latter executed the three notes here in suit, for the half of those profits due to McGill & Co. on that basis. Peerbolte further testified that, at that time, he was in doubt about delivery under these contracts and, for that reason, a clause was written in the notes he then gave McGill which made their payment conditional upon such delivery. Shortly thereafter McGill came back to Peerbolte with those notes, asking him to give him three negotiable notes in place of them, as he was anxious to go back to California and wanted to be in a position to bank the notes. McGill made this request because he said "you know there is no question about the delivery now", and Peerbolte testified that he thought there was no question at that time about getting the onion sets and he, therefore, executed the negotiable promissory notes here in suit, which were substituted for the original three notes, the latter being destroyed at that time.

The defendant testified further that he did not receive delivery of any of the onion sets under the two contracts. As to the Rau contract, he said he asked for delivery several times but could not get it and then he got in touch with Peacock and the latter told him the onion sets called for under that contract were his. Still later Peerbolte said he secured an extension of the time of delivery. Peerbolte testified further that he was the manager of the Cooperative Association and the onion sets called for by that contract were under his control and he,

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himself, delivered the onion sets called for by that contract to Peacock & Co., although he had signed and delivered these promissory notes to McGill in payment of them and, that he made such delivery to Peacock, "because they were actually sold to the company and because I found out in the meantime how this contract was gotten by McGill from Peacock."

From the cross-examination of the witness Peacock, it appears that after his firm went through bankruptcy, the defendant succeeded to the business of that firm. Peacock testified that the defendant "took over my former business, I stayed there and managed it with him." He testified further that he had no connection with Peerbolte at the time he was testifying. The evidence shows that Peacock & Company went into bankruptcy in March, 1922, and Peacock testified that the first thing he did after that was to sell onion sets on commission. He said he sold some for Peerbolte. He further testified that he went to work for Peerbolte the latter part of June or the first part of July.

The record also shows that during the cross-examination of the defendant Peerbolte, he was shown a copy of an advertisement which had appeared in the magazine called "The Seed World" which advertisement had incorporated in it a letter addressed "To Whom it May Concern." That advertisement appears to advertise the business of Peter Peerbolte, "World's Largest Onion Set Grower and Dealer," * * "Main Office and Warehouse, South Holland, Illinois," and "Warehouses at Desplaines, West Pullman, Franklin, Lansing, Norwood Park, and South Holland, Illinois." The letter

himself, delivered the onion sets called for by that contract to Peacock & Co., although he had signed and delivered these promissory notes to McGill in payment of them and, that he made such delivery to Peacock, "because they were actually sold to the company and because I found out in the meantime how this contract was gotten by McGill from Peacock."

From the cross-examination of the witness Peacock, it appears that after his firm went through bankruptcy, the defendant succeeded to the business of that firm. Peacock testified that the defendant "took over my farmer business, I stayed there and managed it with him." He testified further that he had no connection with Pearsolite at the time he was testifying. The evidence shows that Peacock & Company went into bankruptcy in March, 1888, and Peacock testified that the first thing he did after that was to sell onion sets on commission. He said he sold some for Pearsolite. He further testified that he went to work for Pearsolite the latter part of June or the first part of July.

The record also shows that during the cross-examination of the defendant Pearsolite, he was shown a copy of an advertisement which had appeared in the magazine called "The Good World" which advertisement had incorporated in it a letter addressed "To Whom it May Concern." That advertisement appears to advertise the business of Peter Pearsolite, "World's Largest Union Pet Drover and Dealer," "Main Office and Warehouse, South Elkhard, Illinois," and "warehouses at Darlaines, West Pullman, Franklin, Lansing, Norwood Park, and South Holland, Illinois." The letter

above referred to was dated May 1, 1922. It read as follows:

> "Having been well informed as to the position and condition of Mr. Everett R. Peacock, and the corporation which bears his name, as regards their financial difficulties, I am pleased to advise of arrangements having been made between Mr. Peacock and myself whereby I can, and do hereby cheerfully guarantee the fulfillment of any contracts or orders for onion sets which have been taken for future delivery, or which may hereafter be entrusted to his care.
>
> It is my sincere hope that Mr. Peacock and his corporation will eventually work out of their financial difficulties, and in the meantime, I remain,
>
> Yours very truly,
> Peter Peerbolte."

When asked about this letter the defendant testified that the letter and announcement were used for the advertisement of his business in "The Seed World." He said the letter referred entirely to the next year's crop. He was asked whether he was concerned about Peacock making deliveries and he answered that he had bought certain contracts from the receiver for Peacock & Company and had "taken a certain amount of bushels for future delivery." Further, on cross-examination, he was asked whether he paid for the advertisement and he said he didn't know but he presumed he had. He was asked whether Peacock was working for him at that time and he answered: "He worked for me for some time." He was then asked to explain to the jury, if he had bought onion sets and guaranteed them for future delivery, "why it was that the adverisement came out under the name of Everett R. Peacock Company?" and he said he did not know why.

In rebuttal, the plaintiff introduced testimony tending to show that when Peacock & Company went into bankruptcy shortly after the transactions involved in this case,

above referred to was dated May 1, 1928. It read as follows:

> "Having been well informed as to the position and condition of Mr. Everett E. Peacock, and the corporation which bears his name, as regards their financial difficulties, I am pleased to advise of arrangements having been made between Mr. Peacock and myself whereby I can, and do hereby cheerfully guarantee the fulfillment of any contracts or orders for onion sets which have been taken for future delivery, or which may hereafter be entrusted to his care.
>
> It is my sincere hope that Mr. Peacock and his corporation will eventually work out of their financial difficulties, and in the meantime, I remain,
>
> Yours very truly,
>
> Peter Iverson."

When asked about this letter the defendant testified that the letter and announcement were used for the advertisement of his business in "The Seed World." He said the letter referred entirely to the next year's crop. He was asked whether he was concerned about Peacock making deliveries and he answered that he had bought certain contracts from the receiver for Peacock & Company and had "taken a certain amount of people for future delivery." Further, on cross-examination, he was asked whether he paid for the advertisement and he said he didn't know but he presumed he had. He was asked whether Peacock was working for him at that time and he answered: "He worked for me for some time." He was then asked to explain to the jury, if he had bought onion sets and guaranteed them for future delivery, "why it was that the advertisement came out under the name of Everett E. Peacock Company?" and he said he did not know why.

In rebuttal, the plaintiff introduced testimony tending to show that when Peacock & Company went into bankruptcy shortly after the transactions involved in this case,

R. C. McGill & Co. was not listed as a creditor, nor were the onion sets "represented by these warehouse receipts" listed as assets. Whether the onion sets referred to in that connection are the same as called for by the Rau and Cooperative contracts is not clear, but that is the intimation and nothing appears to the contrary. Further testimony submitted by the plaintiff in rebuttal was to the effect that frequent demands had been made uponthe defendant for the payment of these notes, and upon the occasion of such demands the defendant always promised to make payment within a few days.

In support of his appeal the defendant contends that the only theory upon which the plaintiff could recover is that it was a holder in due course and that when it is shown that the title of one who has negotiated a note is defective, it becomes the responsibility of the holder to prove that he, or some one through whom he claims, got title as a holder in due course. Such was the holding of this court in connection with the previous appeal of this case based on Chap. 98, Par. 79, Cahill's Rev. Stat. 1925. This, however, is merely a rule of burden of proof. On the previous appeal this court pointed out that there was some evidence in the record tending to show that the title of McGill & Co. to these notes was defective, in that some evidence tended to show that McGill & Co. did not own and did not have the right to pledge these contracts and, also, that at least one of these notes was negotiated after maturity. Some of the evidence contained in the former record, tending to show the latter item of proof, is not contained in the present record. There is other evidence submitted in this case tending to show

R. C. McGill & Co. was not listed as a creditor, nor were the onion sets "represented by those warehouse receipts" listed as assets. Whether the onion sets referred to in that connection are the same as called for by the Ran and Cooperative contracts is not clear, but that is the inti mation and nothing appears to the contrary. Further testimony submitted by the plaintiff in rebuttal was to the effect that frequent demands had been made upon the defendant for the payment of these notes, and upon the occasion of such demands the defendant always promised to make payment within a few days.

In support of his appeal the defendant contends that the only theory upon which the plaintiff could recover is that it was a holder in due course and that when it is shown that the title of one who has negotiated a note is defective, it becomes the responsibility of the holder to prove that he, or some one through whom he claims, got title as a holder in due course. Such was the holding of this court in connection with the previous appeal of this case based on Chap. 98, Par. 79, Smith's Rev. Stat. 1923. This, however, is merely a rule of burden of proof. On the previous appeal this court pointed out that there was some evidence in the record tending to show that the title of McGill & Co. to these notes was defective, in that some evidence tended to show that McGill & Co. did not own and did not have the right to pledge these contracts and, also, that at least one of these notes was negotiated after maturity. Some of the evidence contained in the former record, tending to show the latter item of proof, is not contained in the present record. There is other evidence submitted in this case tending to show

that McGill & Co. did acquire title to these contracts. In the opinion filed by this court on the previous appeal, after referring to the evidence as set out above, this court held that the questions involved should have been submitted to the jury and, therefore, the trial court had erred in giving the jury a peremptory instruction for the plaintiff. On the retrial of the case there was again some evidence tending to show that the title to McGill & Co. to these notes was defective and there was evidence to the contrary. However, on such trial the controverted questions were submitted to the jury and it is not contended that their finding is against the manifest weight of the evidence, nor, in our opinion, could such a contention be made successfully, in view of all the evidence in the record.

However, we are further of the opinion that the rule as to the burden of proof contained in section 59 of the Negotiable Instrument Law (Cahill's Rev. Stat. Chap. 58, Par. 79) which the defendant seeks to invoke here in his favor is not one of which he may avail himself, because he became bound on these notes prior to the acquisition of the alleged defective title in them. After laying down the rule as to burden of proof which the defendant seeks to invoke, the paragraph of the statute in question continues to say, "but the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title." Woodlawn Trust & Savings Bank v. Donaho, 239 Ill. App. 158.

that Modill & Co. did acquire title to these contracts. In the opinion filed by this court on the previous appeal, after referring to the evidence as set out above, this court held that the questions involved should have been submitted to the jury and, therefore, the trial court had erred in giving the jury a peremptory instruction for the plaintiff. On the retrial of the case there was again some evidence tending to show that the title to Modill & Co. to these notes was defective and there was evidence to the contrary. However, on such trial the controverted questions were submitted to the jury and it is not contended that their finding is against the manifest weight of the evidence, nor, in our opinion, could such a contention be made successfully, in view of all the evidence in the record.

However, we are further of the opinion that the rule as to the burden of proof contained in section 59 of the Negotiable Instrument Law (Smith's Rev. Stat. Chapter 98, Par. 79) which the defendant seeks to invoke here in his favor is not one of which he may avail himself, because he became bound on these notes prior to the acquisition of the alleged defective title in them. After laying down the rule as to burden of proof which the defendant seeks to invoke, the paragraph of the statute in question continues to say, "but the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title." Rockford Trust & Savings Bank v. Zemple, 276 Ill. App. 158.

In further support of the appeal it is pointed out that the court instructed the jury to the effect that, where one takes a promissory note in the usual course of trade for a valuable consideration, before maturity, and is not guilty of bad faith or possessed of knowledge impeaching the value of the note, he would become a holder in due course and the note will not be subject to defense of failure of consideration in his hands. This instruction then went on to tell the jury that, if they believed from the evidence that the notes here in suit were transferred in good faith for a valuable consideration, before maturity, and without knowledge of facts impeaching their validity on the part of the plaintiff, the defendant was not in a position to defeat plaintiff's suit by showing that the notes were given without consideration or that the consideration had failed. It is contended that the court erred in giving such an instruction to the jury because there was no evidence in the record upon which to base it.

In our opinion the defendant is not in a position to urge this matter in as much as it does not come within any error which he has assigned upon the record. Moreover, the defendant submitted and the trial court gave an instruction which was the converse of the one submitted by the plaintiff, of which the defendant now complains. By the instruction submitted by the defendant, the jury was told that, unless they believed from the evidence that the plaintiff became the holder of the notes sued upon before they were overdue, and that the plaintiff took them in good faith and for value, and without notice of any infirmity of the notes or defect in the title from

In further support of the appeal it is pointed out that the court instructed the jury to the effect that, where one takes a promissory note in the usual course of trade for a valuable consideration, before maturity, and is not guilty of bad faith or possessed of knowledge impeaching the value of the note, he would become a holder in due course and the note will not be subject to defense of failure of consideration in his hands. This instruction then went on to tell the jury that, if they believed from the evidence that the notes here in suit were transferred in good faith for a valuable consideration, before maturity, and without knowledge of facts impeaching their validity on the part of the plaintiff, the defendant was not in a position to defeat plaintiff's suit by showing that the notes were given without consideration or that the consideration had failed. It is contended that the court erred in giving such an instruction to the jury because there was no evidence in the record upon which to base it.

In our opinion the defendant is not in a position to urge this matter in as much as it does not come within any error which he has assigned upon the record. Moreover, the defendant submitted and the trial court gave an instruction which was the converse of the one submitted by the plaintiff, of which the defendant now complains. By the instruction submitted by the defendant, the jury was told that, unless they believed from the evidence that the plaintiff became the holder of the notes sued upon before they were overdue, and that the plaintiff took them in good faith and for value, and without notice of any infirmity of the notes or defect in the title from

the one from whom the plaintiff received them, then the plaintiff was not a holder in due course. In such a situation the defendant may not be heard to complain of the instruction on the same subject submitted by the other side.

For the reasons we have given the judgment of the Circuit Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

the one from whom the plaintiff received them, then the plaintiff was not a bailee in due course. In such a situation the defendant may not be heard to complain of the instruction on the same subject submitted by the other side.

For the reasons we have given the judgment of the Circuit Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

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FRANK KLANDER, Appellee, v. S. A. COHN, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

Opinion filed March 2, 1927.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Klander brought this action on the case against the defendant Cohn, in the Superior Court of Cook County, to recover damages for injuries received when he was struck by an automobile being driven by one in the defendant's employ. The issues were submitted to a jury, resulting in a verdict for the plaintiff and a judgment against the defendant, in the sum of $7,500. From that judgment the defendant has perfected this appeal.

Only two points are urged here. First, that the verdict and judgment are against the manifest weight of the evidence on the issue of contributory negligence, and second, that the argument presented to the jury by counsel for the plaintiff was improper and prejudicial.

The accident in which the plaintiff received the injuries involved in this case took place about 10 o'clock on an evening in July, 1923, on Irving Park Boulevard in the City of Chicago. That street runs east and west and is somewhat wider than the average city street at the point where this accident happened. It contains a double track street car line. The plaintiff boarded a westbound street car at

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The accident in which the plaintiff received the injuries involved in this case took place about 10 o'clock on an evening in July, 1922, on Irving Park Boulevard in the City of Chicago. That street runs east and west and is somewhat wider than the average city street at the point where this accident happened. It contains a double track street car line. The plaintiff boarded a westbound street car at

the corner of Hoyne avenue, a north and south street intersecting the boulevard at right angles. The next intersecting street to the west is Leavitt street. Midway between Hoyne avenue and Leavitt street another north and south street known as Hamilton avenue extends from the boulevard south but not north. The car which the plaintiff boarded was crowded and he stood on the step of the rear platform. Shortly after the car left Hoyne avenue, the plaintiff's straw hat blew off and at his request the conductor stopped the car at the corner of Leavitt street where the plaintiff got off and the car went on. The plaintiff then started back to find his hat, running at what the witnesses generally described as a "dog trot," directly east in the north roadway of the boulevard, a foot or so north of the westbound street car track. About this time two automobiles were being driven west in Irving Park Boulevard, in that roadway. One of these westbound automobiles, to which we shall refer as the south car, was being driven near the street car track. Several witnesses say that it was within the westbound track or straddling the north rail of that track. It would seem that the one in the best position to state just where that car was being driven was the witness Lunkes who was driving that car. He testified that his left wheels were a foot or so outside of the north rail of the westbound track. The other westbound automobile, to which we shall refer as the north car, was being driven over near the north curb. That car was being driven by one Clamage, and he had two brothers with him in the car, one sitting at his right on the front seat and the other on a rear seat. The drivers of both the westbound automobiles saw the plaintiff's hat

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blow off and fall into the street, and they both slowed up. The south car had been obliged to stop at Hoyne avenue, by reason of the stopping of the street car at that intersection and it started up when the street car left that point. It does not appear that the other car had stopped at the intersection. It seems from the evidence that as Lunkes was slowing up, the north car came along and passed the south car and came to a stop where the hat was lying, and Clamage's brother who was sitting in the rear seat of that car got out and picked the hat up and then got back in the north car. Both westbound automobiles then drove on for a distance of about 200 feet, at a comparatively slow speed. The testimony of substantially all the occurrence witnesses was to the effect that as the plaintiff came back along the street, looking for his hat, he was directly in front of the path of the south car which Lunkes was driving. The drivers of both cars saw the plaintiff from the time he got off the car until the accident happened. He came back along the street until he was within a few feet of the front end of Lunkes' car. About that time, according to the decided preponderance of the testimony, both these cars had come to a standstill. They were about opposite one another; and Lunkes testified that if Hamilton avenue had extended across Irving Park Boulevard he would have been at about the east crosswalk of that street. The plaintiff testified that as he started back after his hat he did not notice anything coming toward him at first, but as he got near Hamilton avenue he saw "some machines" coming toward him. One of them, apparently referring to the south car, he said was coming "pretty close", and he held out his hand and called

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out that he had lost his hat around there somewhere. At that moment, as already stated, both northbound automobiles had come toaa stop, according to the preponderance of the testimony; the plaintiff had either come to a stop also or substantially so, and had reached a point directly in front of the south car and a few feet from it, when he heard someone call out "Here is your hat". Turning in the direction from which these words had come, which was to the northeast, toward the curb, he saw the north car standing there with one of the Clamage brothers holding his hat toward him from the rear part of the car. The plaintiff testified that the lights on the south car were burning brightly and that it was only after he heard someone call from his left, "Here is your hat," that he noticed the north car standing near the curb. He then started in that direction to get his hat. When he had walked a few feet, - some witnesses say more and some say less,- he was struck by the defendant's car, which was being driven west in the north roadway of the boulevard. It passed between the two standing automobiles, struck the plaintiff and inflicted the injuries which are the basis of this action. The defendant's chauffeur testified that he was driving 12 or 14 miles an hour and that his car did not go more than 5 feet after striking the plaintiff. A brother-in-law of the defendant was riding in the car at the time and he gave testimony tending to corroborate the chauffeur. On the other hand, witnesses for the plaintiff testified that the car was being driven at a speed varying from 35 to 40 miles an hour, and the distances, given by these witnesses, which the car traveled after striking the plaintiff and before coming to a stop, varied from 15 to 50 feet. It is admitted that no warning signal was given

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of the approach of the defendant's car. Lunkes and the Clamage brothers testified that the first intimation they had of the approach of the defendant's car was when they heard the screech of the brakes, just before it passed in between their cars and struck the plaintiff.

The plaintiff testified that after he heard someone say, "Here is your hat," he took only a few steps before being struck; but he also said he thought the right fender of the defendant's car was the part that hit him. The driver of the north car testified that the plaintiff was just about to take his hat when he was struck, - "he was reaching out to get his hat." This witness also testified that he thought it was the bumper that struck the plaintiff.

The witnesses differ as to the distance between the two standing cars at the time the defendant's car passed between them and struck the plaintiff. One of the Clamage brothers said there was "just enough room" between the cars to permit another to pass. Another one of these brothers said the distance was eight or ten feet. The defendant's driver said there was two feet between his car and the south car and three feet between his car and the north car as he passed between them. The plaintiff said that as he heard the call from the north car, and started over to get his hat, " I looked and I didn't see no other car." He also said that the space between the two standing cars, "looked to me it was impossible for a car to go through." He said he did not see the defendant's car until it was three or four feet from him. He was then asked: "So you do not know where it came from, do you?" and he answered, "I don't

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know where it could come from."

The defendant's driver and his brother-in-law were the only witnesses who gave any testimony on the course taken by his car just before the accident. The driver was not entirely consistent in what he said on this subject. He testified that the south car was in the tracks, and he was driving in the roadway and north of the car in the tracks. On cross-examination he testified that he was not driving directly back of the south car, but two or three feet to the side of that car. He was then asked: "Well, part of your machine was back of him wasn't it?" His answer was: "After we had crossed Hoyne avenue, yes sir." The next few questions and answers were to the effect that as he followed the south car after leaving Hoyne avenue, part of the defendant's car was back of the south car. The defendant's driver testified that the south car had not stopped but was still moving when the plaintiff "jumped out in front of him." He was then asked when he drove his machine to the north, and he said he didn't turn it to the north. He was then asked how he could pass the machine that was ahead of him and he answered, "Well, I was along side of him." He was asked if he hadn't stated that part of his machine was back of the other one and he said it was, "at one time," and he then added, "up until the time we crossed Hoyne avenue." Then this subject was gone over again and he stated that the defendant's car never was at any time back of the other car,- "I was along side of him going side by side from the time we left Hoyne avenue. My front wheels were about at his rear door."

It was for the jury to say, on all this evidence

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whether, in their opinion, the plaintiff was guilty of negligence which proximately contributed to the injuries he received. It has been held in a number of cases that it may not be said to be negligence per se for one to pass over a traffic crossing without looking. The question presented in such situations is whether circumstances were present which might reasonably be said to excuse the failure to look. In the case at bar the plaintiff says he did look but he did not see anything approaching. It might be conceded that the plaintiff was careless when he left the street car and deliberately ran back in the roadway of the boulevard against the line of traffic, although he saw the lights of an automobile approaching. But that situation of danger did not result in his injury. The driver of the south car came to a stop, according to the decided weight of the evidence, and as the plaintiff stood or was walking within a few feet of the front of that car and when he heard someone call, from the north side of the roadway, "Here is your hat." he was not in danger. It would seem that the question of whether the plaintiff was guilty of negligence proximately contributing to his injury, must be judged by what happened after that time. After a careful consideration of all the evidence in this record, we are of the opinion that this court may not reasonably say that the conclusion which the jury reached on this question was against the manifest weight of the evidence. In other words we believe that there are circumstances disclosed by this evidence which might reasonably be said to have excused the plaintiff in his failure to observe the condition of the traffic, so as to avoid being struck. He was in the glare of the lights of the south car. He suddenly

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heard the call from the side of the roadway, - "Here is your hat," and upon looking in that direction he saw the north car, from which a passenger in the rear seat was holding out his hat. Both these cars were in the north roadway at a stand-still, according to the greater weight of the evidence. The question of the space between these two standing cars and the position of the defendant's car, as it was coming from the east, is not entirely clear. The evidence is to the effect that the two cars that were standing in the roadway were about opposite the east cross-walk of Hamilton avenue. As we said in Elliott v. Trandel, 227 Ill. App. 359, quoting from Stack v. East St. Louis & Suburban Ry. Co., 245 Ill. 308, "It was impossible for him (plaintiff) by the exercise of a sufficiently high degree of care, to so discover the eastbound car and not have got in its way. He had, however, a right to rely upon his sense of hearing as well as of sight and to expect the appellant, in running its car past another car, stopped for the discharge of passengers, to give warning and observe the ordinance of the city in respect to speed. While the negligence of the appellant did not relieve the deceased from the necessity of exercising care for his own safety, it is to be considered in determining whether his conduct was such as an ordinarily prudent man might have adopted under the circumstances, and that question was properly submitted to the jury." Applying that to the facts presented in the case at bar, we are of the opinion that this plaintiff had a right to rely upon his sense of hearing as well as of sight and it was for the jury to say whether he was guilty of contributory negligence,

heard the call from the side of the roadway, - "Here is your bar," and upon looking in that direction he saw the north car, from which a passenger in the rear seat was holding out his hat. Both these cars were in the north roadway at a stand-still, according to the greater weight of the evidence. The question of the space between these two standing cars and the position of the defendant's car, as it was coming from the east, is not entirely clear. The evidence is to the effect that the two cars that were standing in the roadway were about opposite the east cross-walk of Hamilton avenue. As we said in Millott v. Transit, 227 Ill. App. 229, quoting from Beach v. East St. Louis & Suburban Ry. Co., 245 Ill. 308, "It was impossible for him (plaintiff) by the exercise of a sufficiently high degree of care, to so discover the eastbound car and not have got in its way. He had, however, a right to rely upon his sense of hearing as well as of sight and to expect the appellant, in running its car past another car, stopped for the discharge of passengers, to give warning and observe the ordinance of the city in respect to speed. While the negligence of the appellant did not relieve the deceased from the necessity of exercising care for his own safety, it is to be considered in determining whether his conduct was such as an ordinarily prudent man might have adopted under the circumstances, and that question was properly submitted to the jury." Applying that to the facts presented in the case at bar, we are of the opinion that this plaintiff had a right to rely upon his sense of hearing as well as of sight and it was for the jury to say whether he was guilty of contributory negligence,

under all the circumstances shown by the evidence, it being conceded that no warning signal was given and that nothing was heard of the approach of defendant's car until the screech of the brakes when it was a few feet away from the plaintiff. One element for the consideration of the jury in this connection was whether the plaintiff was reasonably justified in his thought that there was not room enough for another car to come in between the two standing cars, or whether if, in the opinion of the jury, the evidence shows there was sufficient room for another car to pass, the plaintiff might even then be considered as exercising a reasonable degree of care for his own safety when all the other facts were taken into consideration, such as, for example, the fact that the two cars which had come to a stop were at or about the east crosswalk of Hamilton avenue, when, in the view of the jury, it might reasonably be assumed by the plaintiff that the driver of any other vehicle coming up from the east, would observe ordinary care and either come to a stop himself or if he attempted to pass by the two standing cars, under such circumstances, would do so with his vehicle under control, or at least would not be guilty of such negligence as the jury would be justified in believing was the case from the evidence presented.

The contention of the defendant relating to the argument presented to the jury by counselfor the plaintiff is twofold. First, that part of the argument is complained of wherein counsel made reference to the defendant's nationality, and second, it is complained that counsel's argument was inflammatory, in that it was to the effect that plaintiff's

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The contention of the defendant relating to the argument presented to the jury by counsel for the plaintiff is twofold. First, that part of the argument is complained of wherein counsel made reference to the defendant's nationality, and second, it is complained that counsel's argument was inflammatory, in that it was to the effect that plaintiff's

"very life" was at stake; that the case was about to pass into the hands of the jurors for a final determination of whether the plaintiff "shall walk out of this courtroom with compensation for the very, very serious injury that he has sustained or whether he should leave this courtroom without a nickle and you should consent to acquit the defendant in this case. * * * I say to you that you know this man is placing his very future and his very life in your hands."

As to the first point urged against counsel's closing argument, it is urged that an attempt was being made to direct the attention of the jury to the fact of the defendant's nationality and "endeavor by subtle means to use that fact against him." As a general rule, it is best to avoid all reference to the question of nationality of either of the parties to a law suit. We are of the opinion, however, that it may not reasonably be said that counsel for the plaintiff by what he said, was endeavoring to prejudice the jurors against the defendant because of his nationality. In this connection it may not be amiss to observe that counsel who made the argument against which this contention is made was himself of the same nationality. What it would seem, from our examination of the argument, as it appearsin the record, counsel was saying to the jury was that the three witnesses, the brothers in the north car, who had come to testify for the plaintiff and against the defendant, could not be said to be over zealous in the stories they had told in the plaintiff's behalf, because they were of the defendant's nationality.

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We find difficulty in seeing in such an argument any effort to arouse the jurors against the defendant because of his nationality.

As to the second point urged against the argument presented by plaintiff's counsel, we would say that in our opinion, no such argument should have been made. It was quite contrary to the fact, for plaintiff's life was not at stake and he was not putting his life in the juror's hands. Counsel should have limited himself to the questions which were really for the jury to consider and decide. This was quite apparently an attempt to arouse the sympathy of the jury, by extending the subject matter which was being placed in their hands for decision, beyond a point warranted by the facts. However, it is equally apparent that the attempt did not succeed for it could not reasonably be said, in view of the very serious injuries received by this plaintiff, as a result of this accident, that in awarding him damages amounting to $7,500, the jury had been unduly inflamed by any improper argument. If the jury reached the conclusion, from the evidence in the record, that the defendant's driver was guilty of negligence, (and the contrary is not contended here) and that the plaintiff was not guilty of such negligence as proximately contributed to his injury, (and as above stated, we do not feel the verdict may reasonably be said to be against the manifest weight of the evidence on that issue) there was ample reason to be found in the evidence relating to the plaintiff's injuries to warrant the assessment of damages at the amount fixed by the jury, without the jury being in any way affected, to the defendant's prejudice, by anything plaintiff's counsel may have said in what may be considered his over-

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zealousness to impress the jury with the seriousness of the plaintiff's situation.

For the reasons we have given, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. CONCURS;
O'CONNOR, J. DISSENTING:

In my opinion there should have been a directed verdict for the defendant as requested. All of the evidence shows that plaintiff was injured as the result of his own negligence. The two cases cited in the majority opinion as sustaining the contention that the question of whether the plaintiff was guilty of negligence, was a question for thejury, are in my opinion, in no way apt. The facts are entirely dissimilar.

In Elliott v. Trandel, 227 Ill. App. 359, a boy alighted from a standing street car which had stopped at a regular street crossing to discharge passengers. He passed around the rear end of the car on his way across the street and was struck by an automobile traveling in the opposite direction in the parallel street car track.

In the case of Stack v. East St. Louis Ry. Co., 245 Ill. 308, a person alighted from a street car which had stopped to discharge passengers, passed around the rear end of the car and was struck by another street car running on a parallel track in the opposite direction. It is obvious

seriousness to impress the jury with the seriousness of the plaintiff's situation.

For the reasons we have given, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. CONCURS;

O'CONNOR, J. DISSENTING:

In my opinion there should have been a directed verdict for the defendant as requested. All of the evidence shows that plaintiff was injured as the result of his own negligence. The two cases cited in the majority opinion as sustaining the contention that the question of whether the plaintiff was guilty of negligence, was a question for the jury, are in my opinion, in no way apt. The facts are entirely dissimilar.

In Elliott v. Trendel, 287 Ill. App. 322, a boy alighted from a standing street car which had stopped at a regular street crossing to discharge passengers. He passed around the rear end of the car on his way across the street and was struck by an automobile travelling in the opposite direction in the parallel street car track.

In the case of Stack v. East St. Louis Ry. Co., 245 Ill. 326, a person alighted from a street car which had stopped to discharge passengers, passed around the rear end of the car and was struck by another street car running on a parallel track in the opposite direction. It is obvious

that the facts in those cases are in no way similar to the facts in the case at bar.

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30 - 31140

C. A. OTIS, W. A. OTIS, S. E. KLINE, C. S. EATON, M. C. HARNEY, RICHARD INGLIS, Co-partners doing business as C. A. OTIS & CO., Plaintiffs in Error,	ERROR TO CIRCUIT COURT, COOK COUNTY.
v.	
CHARLES T. KNAPP, Defendant in Error.	

Opinion filed March 2, 1927.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff partnership brought this action to recover an amount claimed to be due from the defendant Knapp on a subscription for certain shares of corporate stock, pursuant to an agreement with certain other parties who, with the defendant, entered into a syndicate to deal in this stock, with the plaintiffs as managers of the syndicate. The case was originally instituted against "Charles T. Knapp, personally and as successor to Charles T. Knapp & Co., a corporation, and as a co-partnership." During the trial the plaintiffs, by leave of court, amended the praecipe, summons and declaration by striking out the words, "as successor to Charles T. Knapp & Co., a corporation and as a co-partnership." At the close of the plaintiffs' case the court gave the jury a peremptory instruction to find the issues for the defendant. A verdict to that effect being returned, judgment was entered accordingly, and the plaintiffs have brought the case to this court on writ of error.

O. A. OTIS, W. A. OTIS, S. E. KLINE, G. S. EATON, M. C. HANNEY, RICHARD INGLIS, Co-partners doing business as O. A. OTIS & CO., Plaintiffs in Error,	ERROR TO CIRCUIT COURT, COOK COUNTY,
v.	
CHARLES T. KNAPP, Defendant in Error.	

Opinion filed March 8, 1897.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff partnership brought this action to recover an amount claimed to be due from the defendant Knapp on a subscription for certain shares of corporate stock, pursuant to an agreement with certain other parties who, with the defendant, entered into a syndicate to deal in this stock, with the plaintiffs as managers of the syndicate. The case was originally instituted against "Charles T. Knapp, personally and as successor to Charles T. Knapp & Co., a corporation, and as a co-partnership." During the trial the plaintiffs, by leave of court, amended the praecipe, summons and declaration by striking out the words, "as successor to Charles T. Knapp & Co., a corporation and as a co-partnership." At the close of the plaintiffs' case the court gave the jury a peremptory instruction to find the issues for the defendant. A verdict to that effect being returned, judgment was entered accordingly, and the plaintiffs have brought the case to this court on writ of error.

The evidence submitted in behalf of the plaintiffs showed that they were a co-partnership and were the managers of a syndicate relating to the common stock of a corporation known as the Producers & Refiners Corporation. Those who entered into the syndicate joined in signing a syndicate agreement covering the amount of stock which each was to take. Under date of January 15, 1920, the plaintiffs received a letter signed "Charles T. Knapp & Company" in which the writer stated that they had signed the syndicate agreement and were enclosing a duplicate copy thereof, showing their subscription for $25,000 par value of the common stock of the Producers & Refiners Corporation. On March 18, 1920, the corporation known as the Charles T. Knapp & Company, was dissolved. A certificate of the dissolution of the corporation was introduced in evidence.

Under date of March 30, 1920, shortly after the dissolution of the corporation, the plaintiffs received another letter signed by Knapp personally acknowledging receipt of a letter from the plaintiffs, stating that the stock syndicate had expired on April 1, and that it had been decided to dissolve the syndicate at that time, and requesting Knapp to take up their participation in the syndicate. In this letter Knapp went on to say, "We have been endeavoring to arrange for a bank loan which will enable us to carry this stock for a period, but have found it totally impossible to do so * * * We can see no possibility of taking up our participation at this time, though if the stock can be carried for a reasonable time until we can get some of our other commitments out of the way we will be glad to take care of this."

The evidence submitted in behalf of the plaintiffs showed that they were a co-partnership and were the managers of a syndicate relating to the common stock of a corporation known as the Producers & Refiners Corporation. Those who entered into the syndicate joined in signing a syndicate agreement covering the amount of stock which each was to take. Under date of January 15, 1920, the plaintiffs received a letter signed "Charles T. Knapp & Company" in which the writer stated that they had signed the syndicate agreement and were enclosing a duplicate copy thereof, showing their subscription for $25,000 par value of the common stock of the Producers & Refiners Corporation. On March 18, 1920, the corporation known as the Charles T. Knapp & Company, was dissolved. A certificate of the dissolution of the corporation was introduced in evidence.

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The evidence of the plaintiffs showed that a number of letters passed between the parties relating to this transaction. Under date of April 21, 1920, another letter was sent to the plaintiffs, signed, "Charles T. Knapp," which was in reply to one written by the plaintiffs concerning this subscription, in which the writer said "our situation has not at all changed since our last letter to you. We find it totally impossible to negotiate any bank loan at this time. We will be glad to take some action in this matter just as soon as it is humanly possible to do so." In another letter dated May 13, 1920, signed "Charles T. Knapp & Co., per C.T.K.", the writer said: "I have been absent from the City for some time. * * * We wrote you sometime before my departure, stating that on account of unusual banking conditions we found it totally impossible to take up the remainder of our participation in the syndicate now. * * * The only suggestion that we can offer at the moment is that you figure the balance due on our participation after crediting us with our proportionate share of the profits of the syndicate, and that we give you our note for the net amount, due day in 90 days, you holding the stock as collateral." After receiving this letter the plaintiffs addressed a letter to "Messrs. Charles T. Knapp & Company," following the suggestion in the letter just referred to, stating that the amount due was $15,282.80, and enclosing a note to be executed for that amount. Plaintiffs next introduced another letter, signed "Charles T. Knapp," acknowledging receipt of a letter from the plaintiffs, and calling attention to the note which had been sent for execution, and in this letter the defendant stated that

The evidence of the plaintiffs showed that a number of letters passed between the parties relating to this transaction. Under date of April 21, 1920, another letter was sent to the plaintiffs, signed, "Charles T. Knapp," which was in reply to one written by the plaintiffs concerning this subscription, in which the writer said "our situation has not at all changed since our last letter to you. We find it totally impossible to negotiate any bank loan at this time. We will be glad to take some action in this matter just as soon as it is humanly possible to do so." In another letter dated May 13, 1920, signed "Charles T. Knapp & Co., per C.T.K.", the writer said: "I have been absent from the City for some time. * * * We wrote you sometime before my departure, stating that on account of unusual banking conditions we found it totally impossible to take up the remainder of our participation in the syndicate now. * * * The only suggestion that we can offer at the moment is that you figure the balance due on our participation after crediting us with our proportionate share of the profits of the syndicate, and that we give you our note for the net amount, due May in 90 days, you holding the stock as collateral." After receiving this letter the plaintiffs addressed a letter to "Messrs. Charles T. Knapp & Company," following the suggestion in the letter just referred to, stating that the amount due was $15,388.80, and enclosing a note to be executed for that amount. Plaintiffs next introduced another letter, signed "Charles T. Knapp," acknowledging receipt of a letter from the plaintiffs, and calling attention to the note which had been sent for execution, and in this letter the defendant stated that

he was unable to find the letter forwarding the note, and he concluded something must have happened to it. In this letter he asked the plaintiffs to forward a duplicate of the letter they had sent enclosing the note, together with another note, "and the matter will receive our attention." The proof shows that the defendant advised the plaintiffs "that the firm of Charles T. Knapp & Co. (an Illinois corporation) was dissolved and its charter surrendered in March, 1920," in a letter signed by the defendant under date of June 16, 1922.

The attorney for the plaintiffs testified that at a given time and place he had presented a statement of the account between these parties, to the defendant, showing at that time a balance due amounting to $5,281.25. It appears that at that time the stock which this syndicate had dealt in had been sold and the defendant credited with his share of the selling price. The statement of this account was also excluded upon objection. In our opinion it was admissible. The lawyer for the plaintiffs testified further to the effect that when he exhibited this account to the defendant he asked him whether that was "the account between him and Otis & Co. on the P. & R. stock proposition," and he said it was; and further that it was a correct account and if he had sixty or ninety days he would pay it.

The argument submitted by the defendant in support of the judgment appealed from is based on the contention "that it was necessary for the plaintiffs to show (generally) previous transactions of a monetary character as a foundation for the proof of an account stated." Even on that basis,

he was unable to find the letter forwarding the note, and he concluded something must have happened to it. In this letter he asked the plaintiffs to forward a duplicate of the letter they had sent enclosing the note, together with another note, "and the matter will receive our attention." The proof shows that the defendant advised the plaintiffs "that the firm of Charles T. Knapp & Co. (an Illinois corporation) was dissolved and its charter surrendered in March, 1920," in a letter signed by the defendant under date of June 16, 1922.

The attorney for the plaintiffs testified that at a given time and place he had presented a statement of the account between these parties, to the defendant, showing at that time a balance due amounting to $3,881.35. It appears that at that time the stock which this syndicate had dealt in had been sold and the defendant credited with his share of the selling price. The statement of this account was also excluded upon objection. In our opinion it was admissible. The lawyer for the plaintiffs testified further to the effect that when he exhibited this account to the defendant he asked him whether that was "the account between him and Otis & Co. on the P. & A. stock proposition," and he said it was; and further that it was a correct account and if he had sixty or ninety days he would pay it.

The argument submitted by the defendant in support of the judgment appealed from is based on the contention "that it was necessary for the plaintiffs to show (generally) previous transactions of a monetary character as a foundation for the proof of an account stated." Even on that basis,

we are of the opinion that the testimony submitted by the plaintiffs was sufficient to make such a showing. All the argument submitted in support of the judgment was based on the theory of an account stated, whereas the declaration filed by the plaintiffs in this case included all the usual common counts.

We are of the opinion the plaintiffs made out a prima facie case and the trial court, therefore, erred in directing a verdict for the defendant at the close of the plaintiffs' proof.

The judgment of the Circuit Court is accordingly reversed and the cause is remanded to that court for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

we are of the opinion that the testimony submitted by the plaintiffs was sufficient to make such a showing. All the argument submitted in support of the judgment was based on the theory of an account stated, whereas the declaration filed by the plaintiffs in this case included all the usual common counts.

We are of the opinion the plaintiffs made out a prima facie case and the trial court, therefore, erred in directing a verdict for the defendant at the close of the plaintiffs' proof.

The judgment of the Circuit Court is accordingly reversed and the cause is remanded to that court for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

44 - 31156

GERTRUDE REITER, Plaintiff in Error, v. HAROLD J. REITER, Defendant in Error.	ERROR TO SUPERIOR COURT, COOK COUNTY.

Opinion filed March 2, 1927.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this writ of error the complainant, Gertrude Reiter, seeks to reverse a decree of the Superior Court of Cook County, dismissing her bill for separate maintenance theretofore filed against the defendant, her husband, for want of jurisdiction.

On October 3, 1923, the complainant filed her bill for separate maintenance, charging her husband with cruelty and adultery. In her bill she prayed for an order of ne exeat and also a writ of injunction. Upon the filing of this bill of complaint, summons was issued and given to the Sheriff of Cook County for service. On the reverse side of the summons the defendant's address was given as 341 W. Van Buren Street, and there was also written the further information that the defendant was manager of the "La Rau Fastener Co." Summons was duly returned, showing personal service on the defendant, by a deputy sheriff of Cook County on October 5, 1923. Upon the filing of the bill of complaint the court ordered a writ of ne exeat and also an injunction writ to issue without notice. The complainant filed a ne exeat bond, and the record shows that a deputy sheriff of Cook County

GERTRUDE MOSER,

plaintiff in error,

v.

MANOLO J. MOSER,

defendant in error.

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

Opinion filed March 5, 1947.

MR. JUSTICE WOMACK delivered the opinion of the court.

By this writ of error the complainant, Gertrude Moser, seeks to reverse a decree of the Superior Court of Cook County, dismissing her bill for separate maintenance theretofore filed against the defendant, her husband, for want of jurisdiction.

On October 3, 1942, the complainant filed her bill for separate maintenance, charging her husband with cruelty and adultery. In her bill she prayed for an order of no except and also a writ of injunction. Upon the filing of this bill of complaint, summons was issued and given to the Sheriff of Cook County for service. On the reverse side of the summons the defendant's address was given as 821 W. Van Buren Street, and there was also written the further information that the defendant was manager of the "Im Ran Restaurant Co." Summons was duly returned, showing personal service on the defendant, by a deputy sheriff of Cook County on October 8, 1942. Upon the filing of the bill of complaint the court ordered a writ of no except and also an injunction writ to issue without bond. The complainant filed a no except bond, and the record shows that a deputy sheriff of Cook County

personally served the writ on the defendant and took him into custody on October 5, 1923. The writ of injunction was likewise served upon him on the same date. Thereupon, also on the same date, the defendant filed his general appearance, and on the following day the court entered an order, on motion of the solicitor for the defendant, reciting that the complainant was represented in court by her solicitor, and after a full hearing on defendant's motion to quash the writ of ne exeat, "and it appearing to the court that said defendant Harold J. Reiter is engaged in business in the City of Chicago and upon his representations to remain and care for his wife and children," it was ordered that the writ of ne exeat be quashed.

Under date of October 16, 1923, the defendant filed his answer, denying the charges made against him by the complainant in her bill of complaint. Among other things, in connection with his denial of the charge of adultery, he alleged that in July, 1922, the complainant had caused him to be brought before the Municipal Court of Chicago on a similar charge, where the court discharged him. In connection with his allegation concerning his property and income, he alleged in his answer, "that he is employed as a salesman and manager of the Chicago office for his father," and further, he denied "that he would depart from this State and go beyond the jurisdiction of the court." On November 13, 1923, the defendant filed the affidavit of the treasurer of the "Rau Fastener Company" in which affiant stated "that Harold J. Reiter is employed by said Rau Fastener Company in its Chicago office." This affidavit was apparently filed in connection with a hearing on a motion by complainant for alimony and solicitor's fees.

personally served the writ on the defendant and took him into custody on October 5, 1953. The writ of injunction was likewise served upon him on the same date. Thereupon, also on the same date, the defendant filed his general appearance, and on the following day the court entered an order, on motion of the petitioner for the defendant, recording that the complainant was represented in court by her solicitor, and after a full hearing on defendant's motion to quash the writ of no assets, "and it appearing to the court that said defendant Harold J. Reiter is engaged in business in the City of Chicago and upon his representations to remain and care for his wife and children," it was ordered that the writ of no assets be quashed.

Under date of October 16, 1953, the defendant filed his answer, denying the charges made against him by the complainant in her bill of complaint. Among other things, in connection with his denial of the charge of adultery, he alleged that in July, 1953, the complainant had caused him to be brought before the Municipal Court of Chicago on a similar charge, where the court discharged him. In connection with his allegation concerning his property and income, he alleged in his answer, "that he is employed as a salesman and manager of the Chicago office for his father;" and further, he denied "that he would depart from this state and go beyond the jurisdiction of the court." On November 13, 1953, the defendant filed the affidavit of the treasurer of the "Ken Reiterman Company" in which affiant stated "that Harold J. Reiter is employed by said Ken Reiterman Company, in its Chicago office."

On a motion by complainant for alimony and solicitor's fees, a fiduciary was apparently filed in connection with a hearing

The affidavit covered the subject of the defendant's salary. On the same day, the court entered an order for alimony and solicitor's fees to be paid by the defendant. On January 15, 1926, the complainant made a motion for the entering of a rule on the defendant to show cause why he should not be punished for contempt of court for his refusal to comply with the order of November 13, 1923. The court found that there was due the complainant, under the former order, the sum of $2784.00, and that the defendant was in default to that extent, and the rule prayed for was entered. On February 17, 1926, there was a substitution of solicitors for the defendant, and on the same day, on motion of the defendant, the court ordered that the cause be dismissed "for want of jurisdiction of the subject-matter, for failure to allege residence of the defendant in bill of complaint."

The statute giving a wife the right to bring an action against her husband for separate maintenance, provides that it be brought in the county in which the defendant resides. The bill of complaint in the suit at bar should have contained that jurisdictional allegation. But the allegations of the bill of complaint did not affirmatively state facts showing that the defendant did not live in Cook County, and the record shows that the fact is, he does live in Cook County. This is not only demonstrated by the return of the Sheriff of Cook County, upon the summons, (Raab v. Raab, 150 Ill. App. 554) but it also appears affirmatively from the allegations of the defendant himself. This precise situation was before this court recently in Plotnitsky v. Plotnitsky, 241 Ill. App. 166, where it was

The affidavit covered the subject of the defendant's salary. On the same day, the court entered an order for alimony and solicitor's fees to be paid by the defendant. On January 12, 1956, the complainant made a motion for the entering of a rule on the defendant to show cause why he should not be punished for contempt of court for his refusal to comply with the order of November 12, 1955. The court found that there was due the complainant, under the former order, the sum of $273.00, and that the defendant was in default to that extent, and the rule prayed for was entered. On February 17, 1956, there was a substitution of solicitors for the defendant, and on the same day, on motion of the defendant, the court ordered that the cause be dismissed "for want of jurisdiction of the subject-matter, for failure to allege residence of the defendant in bill of complaint."

The statute giving a wife the right to bring an action against her husband for separate maintenance, provides that it be brought in the county in which the defendant resides. The bill of complaint in the suit at bar should have contained that jurisdictional allegation. But the allegations of the bill of complaint did not affirmatively state facts showing that the defendant did not live in Cook County, and the record shows that the fact is he does live in Cook County. This is not only demonstrated by the return of the sheriff of Cook County, upon the summons, (Nash v. Nash, 180 Ill. App. 554) but it also appears affirmatively from the allegations of the defendant himself. This previous situation was before this court recently in Kirkpatrick v. Kirkpatrick, 341 Ill. App. 156, where it was

held that a bill for separate maintenance, brought by a wife who resides in the county where the suit is brought, which fails to aver that the defendant is a resident of that county, but contains no allegations showing the contrary, may be amended so as to aver the jurisdictional fact required to bring the case within the provisions of thestatute. The chancellor erred in overruling the complainant's objection to the defendant's motion to dismiss. Complaint should have been given an opportunity to make the appropriate amendment to her bill of complaint.

The decree of the Superior Court is reversed and the cause is remanded to that court for further proceedings.

DECREE REVERSED AND CAUSE REMANDED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

300 - 31163

THE NORTHERN TRUST COMPANY, as Executor of the last will and testament of GEORGE LILL, Deceased, Appellee,	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	
WILLIAM S. PACE, ET AL,	
SANFRID HARNSTROM, Appellant.	

Opinion filed March 2, 1927.

MR. JUSTICE THOMSON delivered the opinion of the court.

George Lill, now deceased, to whom we shall refer as complainant, filed his bill in equity to foreclose second and third mortgages on property located at the southeast corner of Sheridan Road and Foster avenue in the City of Chicago, owned by the defendants William S. Pace and his wife. The bill recited that after the making of the two mortgages held by the complainant and also a previous first mortgage, to secure a bond issue of $200,000.00, Mr. and Mrs. Pace had conveyed the real estate to the defendant Harnstrom, by quit claim deed, but although that conveyance appeared to be absolute on its face, it was not intended to be such, but on the contrary, it was expressly agreed between the parties that the premises conveyed by them were to be held by Harnstrom as security for the sum of $25,000, which Harnstrom had loaned to Mr. and Mrs. Pace.

It was alleged that Harnstrom, claiming to have become the owner of the equity in the property, under this

300 - 31165

THE NORTHERN TRUST COMPANY, as
Executor of the last will and
testament of GEORGE LILL, Deceased,

Appellee,

v.

WILLIAM S. PACE, ET AL.,

SANFRID HARNSTROM,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed March 3, 1897.

MR. JUSTICE THOMSON delivered the opinion of the court.

George Lill, now deceased, to whom we shall refer as complainant, filed his bill in equity to foreclose second and third mortgages on property located at the southeast corner of Sheridan Road and Foster avenue in the City of Chicago, owned by the defendants William S. Pace and his wife. The bill recited that after the making of the two mortgages held by the complainant and also a previous first mortgage, to secure a bond issue of $200,000.00, Mr. and Mrs. Pace had conveyed the real estate to the defendant Harnstrom, by quit claim deed, but although that conveyance appeared to be absolute on its face, it was not intended to be such, but on the contrary, it was expressly agreed between the parties that the premises conveyed by them were to be held by Harnstrom as security for the sum of $25,000, which Harnstrom had loaned to Mr. and Mrs. Pace.

It was alleged that Harnstrom, claiming to have become the owner of the equity in the property, under this

quit claim deed, was in possession of a part of the property and collecting the rents, in disregard of the rights of the complainant, as the payment of both principal and interest on the two mortgages he held were in default. The bill further alleged that one Grossman claimed some right in the premises as a mortgagee or creditor. The bill made Mr. and Mrs. Pace, Harnstrom, the three trustees under the first, second and third mortgages; Grossman, as trustee, and Lackner Butz & Company, at whose office the principal and interest was payable on the bonds under the first mortgage as such amounts came to be due, parties defendant.

The defendant Harnstrom filed an answer to the bill of complaint, denying that he held title to the property as security; alleging the Paces were not indebted to him as alleged but that they had conveyed the property to him by a quit claim deed for a consideration of $30,000.

By supplemental bill the complainant Lill set forth certain payments he had been obliged to make on both principal and interest which had fallen due on the first mortgage bonds, and had not been paid by the Paces.

The defendant Harnstrom later filed his cross-bill in which he alleged that the Paces had not been indebted to him at the time they executed their quit claim deed conveying their property to him, which was on October 27, 1922, but that on that date, for a consideration of $30,000.00 they had conveyed the property to him in fee simple; that there had been no agreement for the reconveyance of the property between him and the Paces. He alleged that since the conveyance of the property to him the Paces claimed to be the

quit claim deed, was in possession of a part of the property and collecting the rents, in disregard of the rights of the complainant, as the payment of both principal and interest on the two mortgages he held were in default. The bill further alleged that one Grossman claimed some right in the premises as a mortgagee or creditor. The bill made Mr. and Mrs. Pace, Hartsrtom, the three trustees under the first, second and third mortgages; Grossman, as trustee, and Lookner Bute & Company, at whose office the principal and interest was payable on the bonds under the first mortgage as such amounts came to be due, parties defendant.

The defendant Hartsrtom filed an answer to the bill of complaint, denying that he held title to the property as security; alleging the Paces were not indebted to him as alleged but that they had conveyed the property to him by a quit claim deed for a consideration of $30,000.

By supplemental bill the complainant bill set forth certain payments he had been obliged to make on both principal and interest which had fallen due on the first mortgage bonds, and had not been paid by the Paces.

The defendant Hartsrtom later filed his cross-bill in which he alleged that the Paces had not been indebted to him at the time they executed their quit claim deed conveying their property to him, which was on October 27, 1932, but that on that date, for a consideration of $30,000.00 they had conveyed the property to him in fee simple; that there had been no agreement for the reconveyance of the property between him and the Paces. He alleged that since the conveyance of the property to him the Paces claimed to be the

owners of the property and that his title was only that of a mortgagee; and that om February 26, 1923, the Paces had executed certain notes and a trust deed conveying the property to Max Grossman, as trustee, and that this deed had been recorded and that Pace had filed an affidavit in the Recorder's Office, alleging that the deed given to Harnstrom was a mortgage and not an absolute conveyance, according to the agreement between the parties. He further alleged that the third mortgage, which involved a trust deed to one Dawson, had been executed by the Paces for the purpose of paying and releasing a certain judgment, but that this judgment had not been released but had been assigned to the complainant Lill, who had become the owner of that mortgage and that for that reason the consideration for the notes and trust deed, executed in connection with that third mortgage, had failed and was not a lien upon the property, but a cloud upon Harnstrom's title; and that his title had further become coulded by reason of the trust deed from the Paces to Grossman and the filing of the original bill in this case, alleging that Harnstrom's title was not a fee simple title. By his cross-bill Harnstrom prayed that these clouds be removed and his fee simpel title should be established and quieted.

Mr. and Mrs. Pace filed their answer to the original and supplemental bills of the complainant Lill, admitting all the allegations therein set forth. Demurrers were filed by them as well as by Lill to the cross-bill of Harnstrom, which were overruled. The Paces then filed their answer to that cross-bill, in which they admitted that on October 27, 1922, they were not indebted to Harnstrom, but alleging that prior

owners of the property and that his title was only that of a mortgagee; and that on February 26, 1928, the Paces had executed certain notes and a trust deed conveying the property to Max Grossman, as trustee, and that this deed had been recorded and that Pace had filed an affidavit in the Recorder's Office, alleging that the deed given to Hartnetton was a mortgage and not an absolute conveyance, according to the agreement between the parties. He further alleged that the third mortgage, which involved a trust deed to one Dawson, had been executed by the Paces for the purpose of paying and releasing a certain judgment, but that this judgment had not been released but had been assigned to the complainant Lill, who had become the owner of that mortgage and that for that reason the consideration for the notes and trust deed, executed in connection with that third mortgage, had failed and was not a lien upon the property, but a cloud upon Hartnetton's title; and that his title had further become clouded by reason of the trust deed from the Paces to Grossman and the filing of the original bill in this case, alleging that Hartnetton's title was not a fee simple title. By his cross-bill Hartnetton prayed that these clouds be removed and his fee simpel title should be established and quieted.

Mr. and Mrs. Pace filed their answer to the original and supplemental bills of the complainant Lill, admitting all the allegations therein set forth. Demurrers were filed by them as well as by Lill to the cross-bill of Hartnetton, which were overruled. The Paces then filed their answer to that cross-bill, in which they admitted that on October 27, 1922, they were not indebted to Hartnetton, but alleging that prior

to their execution of the quit claim deed to him on that date, they had made an agreement with him whereby he was to loan them $25,000, in consideration for which they were to pay him $30,000.00, with seven per cent interest, he to take as security for this loan a deed conveying the property in question to him; and that it was in pursuance of that agreement that they executed the deed in question and delivered it to him on the following day. The complainant Lill also filed an answer to Harnstrom's cross-bill, alleging that he had no knowledge of the facts surrounding the execution of the quit claim deed to Harnstrom except such as he had received from the Paces. He alleged that Harnstrom's rights in the property were subordinate to his and he denied that the notes and trust deed from the Paces to Dawson were given for the purpose of paying the judgment referred to in Harnstrom's cross-bill, but he alleged that they were given to prevent execution of that judgment and that he had later purchased the judgment.

Mrs. Pace filed a cross-bill alleging that she and her husband had borrowed $25,000.00 from Harnstrom and to secure that loan with interest, together with an additional sum of $5,000.00 charged as a commission for making the loan, she and her husband conveyed the property in question to him by quit claim deed, which, however, was not intended to be an absolute conveyance, but, under the express agreement and understanding of the parties, it was to be as for the security of the payment of the loan with interest; that she had offered to paybthe loan and the commission, but Harnstrom had refused to receive it and reconvey the property. She alleged that the loan was usurious and prayed that she

to their execution of the quit claim deed to him on that date, they had made an agreement with him whereby he was to loan them $25,000, in consideration for which they were to pay him $30,000.00, with seven per cent interest, he to take as security for this loan a deed conveying the property in question to him; and that it was in pursuance of that agreement that they executed the deed in question and delivered it to him on the following day. The complainant bill also filed an answer to Hernstrom's cross-bill, alleging that he had no knowledge of the facts surrounding the execution of the quit claim deed to Hernstrom except such as he had received from the Paces. He alleged that Hernstrom's rights in the property were subordinate to his and he denied that the notes and trust deed from the Paces to Dawson were given for the purpose of paying the judgment referred to in Hernstrom's cross-bill, but he alleged that they were given to prevent execution of that judgment and that he had later purchased the judgment.

Mrs. Pace filed a cross-bill alleging that she and her husband had borrowed $25,000.00 from Hernstrom and to secure that loan with interest, together with an additional sum of $5,000.00 charged as a commission for making the loan, she and her husband conveyed the property in question to him by quit claim deed, which, however, was not intended to be an absolute conveyance, but, under the express agreement and understanding of the parties, it was to be as for the security of the payment of the loan with interest; that she had offered to pay the loan and the commission, but Hernstrom had refused to receive it and reconvey the property. She alleged that the loan was usurious and prayed that she

might be relieved from the usurious part of the agreement, and that upon repayment to Harnstrom of what might be found to be due him, he should be required to reconvey the property. After demurrer to this cross-bill had been overruled Harnstrom filed his answer, denying the allegations of Mrs. Pace's cross-bill and setting forth again the substance of the allegations he had previously set forth in his own cross-bill.

Issues having been properly joined on these pleadings, the cause was referred to a master, who, after a hearing, submitted his report to the Superior Court of Cook County, finding the facts to be as alleged by the complainant Lill and the cross-complainants, the Paces in their various pleadings; that there was due from them to Lill, in principal and interest on the second and third mortgages and the principal and interest he had paid on the first mortgage, an aggregate of $70,375.72; that the conveyance to Harnstrom was intended and agreed by the parties to be a mortgage and not an absolute conveyance and that there was due from the Paces to him, in principal and interest, less certain rents he had received, an aggregate of $23,583.18. There were certain other findings by the master which need not be noted here. Objections were made to the master's report by the defendant and cross-complainant Harnstrom which were overruled. These objections were allowed to stand as exceptions and later they were overruled and the chancellor entered a decree granting the relief prayed for by the complainant Lill; dismissing Harnstrom's cross-bill for want of equity; finding that the conveyance to him was in the nature of a mortgage and not an absolute conveyance and that the loan made by him to the Paces was

might be relieved from the onerous part of the agreement, and that upon repayment to Harnetron of what might be found to be due him, he should be required to reconvey the property. After demurrer to this cross-bill had been overruled Harnetron filed his answer, denying the allegations of Mrs. Pace's cross-bill and setting forth again the substance of the allegations he had previously set forth in his own cross-bill.

Issues having been properly joined on these pleadings, the cause was referred to a master, who, after a hearing, submitted his report to the Superior Court of Cook County, finding the facts to be as alleged by the complainant bill and the cross-complainants, the Paces in their various pleadings; that there was due from them to bill, in principal and interest on the second and third mortgages and the principal and interest he had paid on the first mortgage, an aggregate of $70,572.72; that the conveyance to Harnetron was intended and agreed by the parties to be a mortgage and not an absolute conveyance and that there was due from the Paces to him, in principal and interest, less certain rents he had received, an aggregate of $22,522.12. There were certain other findings by the master which need not be noted here. Objections were made to the master's report by the defendant and cross-complainant Harnetron which were overruled. These objections were allowed to stand as exceptions and later they were overruled and the chancellor entered a decree granting the relief prayed for by the complainant bill; dismissing Harnetron's cross-bill for want of equity; finding that the conveyance to him was in the nature of a mortgage and not an absolute conveyance and that the loan made by him to the Paces was

usurious; and that the amount he was entitled to as of the date of the decree, was $25,822.60. The property was ordered to be sold subject to the first mortgage, to satisfy the amounts due to Lill and to Harnstrom. Other incidental relief was provided for, to which we shall refer later.

Harnstrom perfected an appeal to the Supreme Court on the theory that a free-hold was involved. That court held that a freehold was not involved, and transferred the cause to this court, - Lill v. Pace, 320 Ill. 522.

In support of the conclusinn that the debt from the Paces to Harnstrom was in the nature of a mortgage, the master found that at the time that conveyance took place, the property in question was worth about $450.000.00 and that the encumbrances then outstanding against it aggregated $226,435.00 "so that at the time of said conveyance to Harnstrom the property was worth about twice the amount of the mortgages then outstanding against it," and it was therefore not reasonable to suppose that the Paces would have sold their equity for $25,000.00 cash. The master also found in this connection that the deed from the Paces to Harnstrom, although reciting a consideration of $30,000.00 had only $6.00 in revenue stamps affixed to it, which was the appropriate amount required on notes and evidences of indebtedness; whereas if the deed had purported to convey an absolute title, thirty dollars in revenue stamps would have been the amount required.

It is the contention of the appellant Harnstrom

usurious; and that the amount he was entitled to as of the date of the decree, was $28,222.60. The property was ordered to be sold subject to the first mortgage, to satisfy the amounts due to Lill and to Harnetson. Other incidental relief was provided for, to which we shall refer later.

Harnetson perfected an appeal to the Supreme Court on the theory that a free-hold was involved. That court held that a freehold was not involved, and transferred the cause to this court. - Lill v. Pace, 320 Ill. 222.

In support of the conclusion that the debt from the Paces to Harnetson was in the nature of a mortgage, the master found that at the time that conveyance took place, the property in question was worth about $450,000.00 and that the encumbrances then outstanding against it aggregated $226,450.00 "so that at the time of said conveyance to Harnetson the property was worth about twice the amount of the mortgages then outstanding against it," and it was therefore not reasonable to suppose that the Paces would have sold their equity for $28,000.00 cash. The master also found in this connection that the deed from the Paces to Harnetson, although recitING a consideration of $30,000.00 had only $6.00 in revenue stamps affixed to it, which was the appropriate amount required on notes and evidences of indebtedness; whereas if the deed had purported to convey an absolute title, thirty dollars in revenue stamps would have been the amount required.

It is the contention of the appellant Harnetson

that there is no evidence in the record to support the master's finding as to the value of the property. In our opinion the record does not bear out that contention. Pace testified that the fair market value of the property in October 1922, was between $450,000.00 and $500,000.00. On cross-examination he testified that in 1923 he had listed the property at $380,000.00, "in order to get cleaned up." One witness testifying for the plaintiff gave it as his opinion that at the time he was testifying, (November, 1923), the property was worth from $325,000.00 to $350,000.00. Harnstrom was the owner of the south half of the block on Sheridan Road in which the Pace property was located. Another witness for the plaintiff testified that in 1922 Harnstrom told him he had been offered $440,000.00 for his vacant, and he expressed regret that he had not sold at that time. The man who placed the first mortgage on the property to secure the bond issue said that they placed a value on it "for loan purposes" but not for sale and that they considered its value on that basis at the time of the conveyance of the Paces to Harnstrom to be $365,000.00, - it would "not be any less. I think the general tendency in that district has been to go up." A witness who owned property on the west side of Sheridan Road stated he was offered a price per foot in 1922, "before I remodeled," which, applied to the property in question, would give it a value of $342,000.00. Several witnesses testifying for Harnstrom, one of them being the father of his son-in-law, gave values as low as $250,000.00. Even if we took the view that the conclusion reached by the master as to value was somewhat high, all the evidence in the record, in our

that there is no evidence in the record to support the master's finding as to the value of the property. In our opinion the record does not bear out that contention. Pace testified that the fair market value of the property in October 1922, was between $450,000.00 and $500,000.00. On cross-examination he testified that in 1923 he had listed the property at $380,000.00, "in order to get cleaned up." One witness testifying for the plaintiff gave it as his opinion that at the time he was testifying, (November, 1922), the property was worth from $325,000.00 to $350,000.00. Hartnetom was the owner of the south half of the block on Sheridan Road in which the Pace property was located. Another witness for the plaintiff testified that in 1922 Hartnetom told him he had been offered $440,000.00 for his vacant, and he expressed regret that he had not sold at that time. The man who placed the first mortgage on the property to secure the bond issue said that they placed a value on it "for loan purposes" but not for sale and that they considered its value on that basis at the time of the conveyance of the Pages to Hartnetom to be $325,000.00, - it would "not be say less. I think the general tendency in that district has been to go up." A witness who owned property on the west side of Sheridan Road stated he was offered a price per foot in 1922, "before I remodeled," which, applied to the property in question, would give it a value of $342,000.00. Several witnesses testifying for Hartnetom, one of them being the father of his son-in-law, gave values as low as $250,000.00. Even if we took the view that the conclusion reached by the master as to value was somewhat high, all the evidence in the record, in our

opinion, would, nevertheless, justify a conclusion that it was very considerably above the aggregate of the encumbrances against the property, and, therefore, the master was justified in considering this element of value as an important one tending to show that the Paces would not have been willing to part with their equity in the property at that time for $25,000.00 or for $30,000.00.

Appellant makes the further contention that the evidence in the record fails to justify a finding that there was a debt created from the Paces to him, and that as there was no debt there could be no mortgage. This is based on the further contention that the Paces never promised to repay him at any time. It may be that there is no direct evidence of an express promise to pay, but that is not necessary to support the finding that there was a debt. There is much testimony tending to show that it was not only understood but expressly stated by the parties that this money was a loan and was to be repaid in the course of three or four months, and further that the agreement between the parties was that the deed from the Paces to Harnstrom was to convey title to him for the purpose of security for the repayment of the debt. Pace testified that in the fall of 1922, he and his wife and Harnstrom had been close friends for some time. They all lived at the Edgewater Beach Hotel. He said that he had a talk with Harnstrom shortly before this deed was given, in which he told him that he needed $25,000.00 and that Mrs. Pace had consented to permit him to borrow that amount against the property she owned, which was the property in question; that he told Harnstrom there were two ways of accomplishing it if Harnstrom was willing to let him have the money. One

opinion, would, nevertheless, justify a conclusion that it was very considerably above the aggregate of the encumbrances against the property, and, therefore, the master was justified in considering this element of value as an important one tending to show that the Pases would not have been willing to part with their equity in the property at that time for $25,000.00 or for $30,000.00.

Appellant makes the further contention that the evidence in the record fails to justify a finding that there was a debt created from the Pases to him, and that as there was no debt there could be no mortgage. This is based on the further contention that the Pases never promised to repay him at any time. It may be that there is no direct evidence of an express promise to pay, but that is not necessary to support the finding that there was a debt. There is much testimony tending to show that it was not only understood but expressly stated by the parties that this money was a loan and was to be repaid in the course of three or four months, and further that the agreement between the parties was that the deed from the Pases to Harnetson was to convey title to him for the purpose of security for the repayment of the debt. Pase testified that in the fall of 1922, he and his wife and Harnetson had been close friends for some time. They all lived at the Edgewater Beach Hotel. He said that he had a talk with Harnetson shortly before this deed was given, in which he told him that he needed $25,000.00 and that Mrs. Pase had consented to permit him to borrow that amount against the property she owned, which was the property in question; that he told Harnetson there were two ways of accomplishing it if Harnetson was willing to let him have the money. One

way was for Harnstrom to take a mortgage, "and the other if I do as I did with Dawson about five years ago when I borrowed $22,000.00 from him and put up the deed as security". He testified that he told Harnstrom that the first mortgage of $200,000.00 on this property had been reduced to $190,000.00; that the amount due Lill was about $26,000.00, and that due on the third mortgage was about $12,000.00; "and if I get this from you it would make about $253,000.00". He testified further that Harnstrom said he would not be interested in a mortgage "but if I loan you the money on the deed" he wanted to know when it could be paid back, and Pace replied that he could pay it in three or four months; that Harnstrom wanted to know where he would get the money to pay it back and he replied to the effect that the second and third mortgages were due and the holders were pressing for payment and his plan was to put on a new second mortgage to clean up the two that were due "and also take care of this." He further testified that Harnstrom replied that he turned his money pretty often and he ought to have 20 per cent "on a loan like that," which would be $6,000.00 on a $30,000.00 loan; that Pace then explained that he only wanted $25,000.00 and he added "I will give you $5,000 or pay you back thirty for the twenty-five when we pay you back," to which Harnstrom replied, "All right, I'll do that. But I want it understood that I will want you to pay me 7 per cent interest on my money while the money is out," to which Pace agreed. Pace testified that Harnstrom added "I will finance you for that amount of money." He further testified that he tried to get Harnstrom to give them some kind of a guarantee "in

way was for Harnetrom to take a mortgage, "and the other if I do as I did with Dawson about five years ago when I borrowed $22,000.00 from him and put up the deed as security". He testified that he told Harnetrom that the first mortgage of $200,000.00 on this property had been reduced to $180,000.00; that the amount due Lill was about $26,000.00, and that due on the third mortgage was about $12,000.00; "and if I get this from you it would make about $222,000.00". He testified further that Harnetrom said he would not be interested in a mortgage "but if I loan you the money on the land" he wanted to know when it could be paid back, and Pace replied that he could pay it in three or four months; that Harnetrom wanted to know where he would get the money to pay it back and he replied to the effect that the second and third mortgages were due and the holders were pressing for payment and his plan was to put on a new second mortgage to clean up the two that were due "and also take care of this." He further testified that Harnetrom replied that he turned his money pretty often and he ought to have 20 per cent "on a loan like that," which would be $6,000.00 on a $30,000.00 loan; that Pace then explained that he only wanted $25,000.00 and he added "I will give you $5,000 or pay you back thirty for the twenty-five when we pay you back," to which Harnetrom replied, "All right, I'll do that. But I want it understood that I will want you to pay me 7 per cent interest on my money while the money is out," to which Pace agreed. Pace testified that Harnetrom added "I will finance you for that amount of money." He further testified that he tried to get Harnetrom to give them some kind of a guarantee "in

case you die or in case something would happen to you, that would protect our rights in this;" but that Harnstrom said in view of the fact they were such good friends he wouldn't need anything of that kind. There was also some additional evidence along this line which it will not be necessary to set forth here. The conversations testified to by Pace were denied by Harnstrom.

In addition to the reasons set forth in the master's report supporting his finding that this conveyance was a mortgage, the record shows that Harnstrom admitted on cross-examination that he did not take possession when he received this deed; the leases were not assigned to him; the insurance was not transferred to him; and he never paid taxes on the property nor any of the interest on any of the encumbrances.

Pace t stified that on the morning of October 28, the day following the conversation previously testified to by him, he met Harnstrom in the lobby of the Edgewater Beach Hotel and the latter produced the deed to be executed by the Paces, and an affidavit also to be executed by them, covering their title, and a check for $30,000.00; that when his wife noticed the amount of the check she commented on it saying she thought her husband was only borrowing $25,000.00, whereupon Harnstrom explained that the check included his commission and that he and Pace would "fix that when they got down to the bank, - that he did that in order to keep his records straight." He further testified that they had some talk about the time within which this money was to be paid back and that his wife thought three or four months was probably too short and Harnstrom assured them that if that wasn't enough they need not worry, for he would give them more time

case you die or in case something would happen to you, that would protect our rights in this;" but that Harnetrom said in view of the fact they were such good friends he wouldn't need anything of that kind. There was also some additional evidence along this line which it will not be necessary to set forth here. The conversations testified to by Pace were denied by Harnetrom.

In addition to the reasons set forth in the master's report supporting his finding that this conveyance was a mortgage, the record shows that Harnetrom admitted on cross-examination that he did not take possession, when he received this deed; the leases were not assigned to him; the insurance was not transferred to him; and he never paid taxes on the property nor any of the interest on any of the encumbrances.

Pace testified that on the morning of October 28, the day following the conversation previously testified to by him, he met Harnetrom in the lobby of the Edgewater Beach Hotel and the latter produced the deed to be executed by the Paces, and an affidavit also to be executed by them, conveying their title, and a check for $80,000.00; that when his wife noticed the amount of the check she commented on it saying she thought her husband was only borrowing $28,000.00, whereupon Harnetrom explained that the check included his commission and that he and Pace would "fix that when they got down to the bank, - that he did that in order to keep his records straight." He further testified that they had some talk about the time within which this money was to be paid back and that his wife thought three or four months was probably too short and Harnetrom assured them that if that wasn't enough they need not worry, for he would give them more time

if they needed it; that Mrs.Pace said she thought Harnstrom was making $5,000.00 pretty easy and he replied that he made his money by turning it often, and Pace remarked that "if this runs a whole year you will be making 27 per cent." After the deed was signed and acknowledged and the affidavit had been executed and Mrs. Pace had endorsed the $30,000.00 check, Pace and Harnstrom went down town to the bank. There, at Harnstrom's request, Pace endorsed the $30,000.00 check, whereupon Harnstrom handed it to the cashier of the bank, who in turn delivered two cashier's checks to Harnstrom, one for $25,000.00 and the other for $5,000.00, both drawn to the order of Pace. The latter testified that at Harnstrom's request he then endorsed the $5,000.00 check, Harnstrom explaining that this represented his commission; that Harnstrom then handed him the $25,000 check and he handed Harnstrom the deed and the affidavit; and that Harnstrom then went to a teller's window and deposited the $5,000.00 check in his account. He further testified that he made some effort to get Harnstrom not to record the deed but the latter explained that he would have to do so, "because if I didn't I wouldn't have any security."

Early in the hearing (December 11, 1923) Harnstrom appeared before the master as a witness and gave testimony supporting the allegations found in his pleadings. On cross-examination he insisted that the amount he had paid for the equity in this property was $30,000.00 and that it was not true that the amount the Paces got from him was only $25,000.00. He denied that it was any part of their transaction that he would receive $5,000.00 back immediately, and he denied that

if they needed it; that Mrs.Pace said she thought Harraston was making $6,000.00 pretty easy and he replied that he made his money by turning it often, and Pace remarked that "if this runs a whole year you will be making 27 per cent." After the deed was signed and acknowledged and the affidavit had been executed and Mrs. Pace had endorsed the $30,000.00 check, Pace and Harraston went down town to the bank. There, at Harraston's request, Pace endorsed the $30,000.00 check, whereupon Harraston handed it to the cashier of the bank, who in turn delivered two cashier's checks to Harraston, one for $25,000.00 and the other for $5,000.00, both drawn to the order of Pace. The latter testified that at Harraston's request he then endorsed the $5,000.00 check, Harraston explaining that this represented his commission; that Harraston then handed him the $25,000 check and he handed Harraston the deed and the affidavit; and that Harraston then went to a teller's window and deposited the $5,000.00 check in his account. He further testified that he made some effort to get Harraston not to record the deed but the latter explained that he would have to do so, "because if I didn't I wouldn't have any security."

Early in the hearing (December 11, 1928) Harraston appeared before the master as a witness and gave testimony supporting the allegations found in his pleadings. On cross-examination he insisted that the amount he had paid for the equity in this property was $30,000.00 and that it was not true that the amount the Paces got from him was only $25,000.00. He denied that it was any part of their transaction that he would receive $5,000.00 back immediately, and he denied that

the fact was that he did receive $5,000.00 back at once, in currency or otherwise. He was asked whether it was not a fact that at the time this transaction was closed he secured a cashier's check in the State Bank of Chicago for the amount of $5,000.00 payable to the order of Pace and that the latter endorsed it and handed it back to him, and he said that was not true.

At the next hearing before the master which occurred about a week later, a clerk employed in the Auditing department of the State Bank of Chicago produced two cashier's checks, both dated October 28, 1922, payable to the order of Pace, one for $25,000.00 and the other for $5,000.00. The latter check was endorsed by Pace, following which was the endorsement "S. Harnstrom & Company," which is shown to have been the name under which Harnstrom did business. This check was paid on the same date. Late in the following April Harnstrom again appeared before the master in rebuttal, the lapse of time being explained by the contention that Harnstrom had been in very poor health, and, according to a physician's certificate, unable to testify. The record shows that there was a Mrs. Wilson who has known Harnstrom since 1910, and for many years had been his renting agent, handling his property, and at the time the evidence in this case was presented to the master, she was acting as his nurse and secretary. Harnstrom testified that he sent her to the Recorder's Office to see if the title of this property was in Mr. and Mrs. Pace; and that she later took the deed from the Paces to him to that office to have it recorded. When he testified in rebuttal, upon the occasion above referred to, he stated that he did not endorse the

the fact was that he did receive $5,000.00 back at once, in currency or otherwise. He was asked whether it was not a fact that at the time this transaction was closed he secured a cashier's check in the State Bank of Chicago for the amount of $5,000.00 payable to the order of Pace and that the latter endorsed it and handed it back to him, and he said that was not true.

At the next hearing before the master which occurred about a week later, a clerk employed in the Auditing department of the State Bank of Chicago produced two cashier's checks, both dated October 28, 1922, payable to the order of Pace, one for $25,000.00 and the other for $5,000.00. The latter check was endorsed by Pace, following which was the endorsement "S. Hartnetson & Company," which is shown to have been the name under which Hartnetson did business. This check was paid on the same date. Late in the following April Hartnetson again appeared before the master in rebuttal, the lapse of time being explained by the contention that Hartnetson had been in very poor health, and, according to a physician's certificate, unable to testify. The record shows that there was a Mrs. Wilson who has known Hartnetson since 1910, and for many years had been his renting agent, handling his property, and at the time the evidence in this case was presented to the master, she was acting as his nurse and secretary. Hartnetson testified that he sent her to the Recorder's Office to see if the title of this property was in Mr. and Mrs. Pace; and that she later took the deed from the Paces to him to that office to have it recorded. When he testified in rebuttal, upon the occasion above referred to, he stated that he did not endorse the

$5,000.00 cashier's check in the presence of Pace, as the latter testified. Furthermore, he denied that Pace had handed the $5,000.00 check to him, but he said: "He handed me the envelope with the deed and the -- Well, here are all the papers, he says." He testified that he then took this envelope over to another part of the bank where Mrs. Wilson was waiting, and handed it to her. He was asked how he came by that check, in the course of his direct examination, and he said: "Mrs. Wilson handed it to me to endorse it;" and that she handed it to him with the request that he apply it in part payment of a loan she hadpreviously made from him on which there was due something in excess of $5,000.00. He further testified in substance that the Paces had been trying to get him to buy the equity in this property for some time but he had repeatedly declined to do so, and that they had finally enlisted the services of Mrs. Wilson and promised her that if she could induce Harnstrom to buy the property they would pay her a commission of $5,000.00; that she, on a number of occasions, had urged him to make this purchase, and he finally agreed to do so, and this $5,000.00 check was in payment of the commission which was due from the Paces to Mrs. Wilson for negotiating this transfer. In explanation of the absence of Mrs. Wilson's endorsement on the check, it was stated that she said that rather than endorse this check and bank it in her account and then give Harnstrom her check, to apply on her loan from him, he might as well take the check as it was and apply it as she requested. Mrs. Wilson gave testimony corroborating this version of the $5,000.00 check. Both Mr. and Mrs. Pace took the stand in

$5,000.00 cashier's check in the presence of Pace, as the latter testified. Furthermore, he denied that Pace had handed the $5,000.00 check to him, but he said: "He handed me the envelope with the deed and the -- Well, here are all the papers, he says." He testified that he then took this envelope over to another part of the bank where Mrs. Wilson was waiting, and handed it to her. He was asked how he came by that check, in the course of his direct examination, and he said: "Mrs. Wilson handed it to me to endorse it;" and that she handed it to him with the request that he apply it in part payment of a loan she badpreviously made from him on which there was due something in excess of $5,000.00. He further testified in substance that the Paceshad been trying to get him to buy the equity in this property for some time but he had repeatedly declined to do so, and that they had finally enlisted the services of Mrs. Wilson and promised her that if she could induce Hernstrom to buy the property they would pay her a commission of $5,000.00; that she, on a number of occasions, had urged him to make this purchase, and he finally agreed to do so, and this $5,000.00 check was in payment of the commission which was due from the Paces to Mrs. Wilson for negotiating this transfer. In explanation of the absence of Mrs. Wilson's endorsement on the check, it was stated that she said that rather than endorse this check and bank it in her account and then give Hernstrom her check, to apply on her loan from him, he might as well take the check as it was and apply it as she requested. Mrs. Wilson gave testimony corroborating this version of the $5,000.00 check. Both Mr. and Mrs. Pace took the stand in

rebuttal and denied that there had ever been any such arrangement or that they had ever had any conversation with Mrs. Wilson involving the sale of this property or any services she might render in connection with such a transaction.

Pace testified that he made an arrangement for a mortgage to clear up everything, including this loan, early in 1923. At that time Harnstrom was in ill health and absent in California. He testified that he called up the hotel at Los Angeles where Harnstrom was, on January 28 or 29, and talked with Mrs. Wilson, telling her that they were ready to "put up the money and wanted to know how we would arrange it about getting the deed back," and she said she would ask Harnstrom. Objection was made to further testimony as to what Mrs. Wilson told the witness, but he then said that Mrs. Wilson sent a telegram. That telegram appears in the record, dated at Los Angeles, February 2, 1923, addressed to Pace and signed by Harnstrom. It reads; "PUT UP YOUR MONEY TITLE AND TRUST CAN WIRE ME." The record shows that later in that month the Paces arranged to borrow $54,000.00 from one Shelensky, and both these parties entered into an escrow agreement which was deposited with the Chicago Title & Trust Company. This agreement recited that Shelensky had delivered a check for $54,00.00 to the Trust Company, pending the issuance of a title guartantee policy on the property in question, on or before March 15, guaranteeing against defects in the title of Mrs. Pace to that property, subject only to certain formal defects referred to and the first mortgage then amounting to $190,000.00.

rebutted and denied that there had ever been any such arrangement or that they had ever had any conversation with Mrs. Wilson involving the sale of this property or any services she might render in connection with such a transaction.

Pace testified that he made an arrangement for a mortgage to clear up everything, including this loan, early in 1933. At that time Hermstrom was in ill health and absent in California. He testified that he called up the hotel at Los Angeles where Hermstrom was, on January 28 or 29, and talked with Mrs. Wilson, telling her that they were ready to "put up the money and wanted to know how we would arrange it about getting the deed back," and she said she would ask Hermstrom. Objection was made to further testimony as to what Mrs. Wilson told the witness, but he then said that Mrs. Wilson sent a telegram. That telegram appears in the record, dated at Los Angeles, February 2, 1933, addressed to Pace and signed by Hermstrom. It reads; "PUT UP YOUR MONEY TITLE AND TRUST BAK WITH ME." The record shows that later in that month the Paces arranged to borrow $64,000.00 from one Shelenskiy, and both these parties entered into an escrow agreement which was deposited with the Chicago Title & Trust Company. This agreement recited that Shelenskiy had delivered a check for $64,00.00 to the Trust Company, pending the issuance of a title guarantee policy on the property in question, on or before March 15, guaranteeing against defects in the title of Mrs. Pace to that property, subject only to certain formal defects referred to and the first mortgage then amounting to $130,000.00.

The escrow agreement further recited that the Paces had executed a trust deed to Max Grossman, as trustee, to secure their notes covering this loan, and that the deed and notes had been deliveredto the Trust Company under the escrow agreement. By the terms of the agreement the Paces authorized the Trust Company, in case they issued the policy called for, to pay to "S. Harnstrom amount necessary to obtain deed - $30,751." and interest; and further to pay the amount needed to obtain release of the second and third mortgages, and then pay Grossman $100.00; and the balance, less the charges of the Trust Company to Mrs. Pace. The record shows that it proved impossible to satisfy the requirements of the Trust Company as to the title and the guarantee policy contemplated by the escrow agreement was never issued and the money put up by Shelensky was returned to him.

On the other hand, as tending to support Hannstrom's version of the transaction involving the deed of the Paces to him, the record shows a letter dated November 16, 1922, less than three weeks after this deed was given, which Harnstrom testified he sent to Pace and which counsel for Pace admitted he had received, in which Harnstrom purports to authorize Pace to act as his agent "and account to me for all the income and disbursements of the apartment building," in question. He added in this letter that he had no objection to allow the agents who were then taking care of the building to continue to do so, and he went on, "but I will look to you and hold you responsible and will call upon you for statements which you will please furnish me at any time

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On the other hand, as tending to support Hannatron's version of the transaction involving the deed of the Pases to him, the record shows a letter dated November 16, 1952, less than three weeks after this deed was given, which Hannatron testified he sent to Pase and which counsel for Pase admitted he had received, in which Hannatron purports to authorize Pase to act as his agent "and account to me for all the income and disbursements of the apartment building," in question. He added in this letter that he had no objection to allow the agents who were then taking care of the building to continue to do so, and he went on, "but I will look to you and hold you responsible and will call upon you for statements which you will please furnish me at any time

that you are called upon hereafter. This agreement is subject to cancellation by myself at any time." No explanation of this letter on the part of Pace appears in the record, so far as we have been able to find. There is also a letter in the record, dated December 16, 1922, to the agents who had long had charge of the building, appointing them to act for Harnstrom on this building which, "formerly belonged to Mr. and Mrs. Pace," and directing the agents to pay the seni annual interest due on the first mortgage the following January. There is another letter signed by Harnstrom, "owner," directed to all tenants in the building and notifying them to pay rent to the agents Cline & Dix, "Mr. and Mrs. Wm. S. Pace having disposed of their interest." Another letter dated January 1, 1923, addressed to Cline & Dix appears in the record, in which Harnstrom refers to instructions concerning the payment of the interest on the first mortgage and asks them to see the agents to whom the payments were to be made on that mortgage, and if possible arrange with them to accept payment ofthe interest at that time.

Cline testified that the letter addressed to his firm, dated December 16, was received by them at that time, but that the one addressed to the tenants was not received by them until March 24, 1923. He was asked when he received the letter dated January 1,1923, and he answered "Well, the first part of January I think." He was later recalled to the stand and testified that he had refreshed his memory as to the letter of January 1, and that it was received by him on March 31, 1923, being handed to him personally at the Edgewater Beach Hotel by Mrs. Wilson. In that letter Harnstrom purports to state that he is ill in Southern

that you are called upon hereafter. This agreement is subject to cancellation by myself at any time." No explanation of this letter on the part of Pace appears in the record, so far as we have been able to find. There is also a letter in the record, dated December 16, 1922, to the agents who had long had charge of the building, appointing them to act for Hernstrom on this building which, "formerly belonged to Mr. and Mrs. Pace," and directing the agents to pay the semi annual interest due on the first mortgage the following January. There is another letter signed by Hernstrom, "owner," directed to all tenants in the building and notifying them to pay rent to the agents Cline & Dix, "Mr. and Mrs. W. S. Pace having disposed of their interest." Another letter dated January 1, 1923, addressed to Cline & Dix appears in the record, in which Hernstrom refers to instructions concerning the payment of the interest on the first mortgage and asks them to see the agents to whom the payments were to be made on that mortgage, and if possible arrange with them to accept payment of the interest at that time.

Cline testified that the letter addressed to his firm, dated December 16, was received by them at that time, but that the one addressed to the tenants was not received by them until March 24, 1923. He was asked when he received the letter dated January 1, 1923, and he answered "Well, the first part of January I think." He was later recalled to the stand and testified that he had refreshed his memory as to the letter of January 1, and that it was received by him on March 31, 1923, being handed to him personally at the Edgewater Beach Hotel by Mrs. Wilson. In that letter Hernstrom purports to state that he is ill in Southern

California.

We have stated the substance of the material evidence bearing on the issue of whether a debt existed from the Paces to Harnstrom and whether the understanding was that the deed given Harnstrom was to be what it purported to be on its face or whether it was, on the other hand, to be in the nature of a mortgage. On this conflicting state of the record, we are of the opinion that it may not reasonably be said that the finding of the master and the decree of the chancellor, to the effect that the conveyance was in the nature of a mortgage, is against the manifest weight of the evidence. On the contrary, the evidence is clear and convincing that the conveyance was a mortgage and not a deed. In our opinion no other decree could stand in this case.

Appellant further urges in support of his appeal that the decree of the chancellor should be reversed because certain necessary parties were not made defendants. In this connection it is pointed out that although the Trust Company was made a party defendant, as trustee, it was not made a party defendant as escrowee; and that although Grossman was made a party defendant, as trustee, he was not made a party defendant individually; and further that the owners of the notes secured by the Grossman trust deed were not made parties defendant. In our opinion these contentions are without merit, if for no other reason, because no such question was raised in the trial court. As to the unknown owners of the notes secured by the Grossman trust deed, it appears that appellant himself brought them in as parties when he filed his cross-bill. As the record stands they

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Appellant further urges in support of his appeal that the decree of the chancellor should be reversed because certain necessary parties were not made defendants. In this connection it is pointed out that although the Trust Company was made a party defendant, as trustee, it was not made a party defendant as mortgagee; and that although Grossman was made a party defendant, as trustee, he was not made a party defendant individually; and further that the owners of the notes secured by the Grossman trust deed were not made parties defendant. In our opinion these contentions are without merit, if for no other reason, because no such question was raised in the trial court. As to the unknown owners of the notes secured by the Grossman trust deed, it appears that appellant himself brought them in as parties when he filed his cross-bill. As the record stands they

were not necessary parties to the complainant's bill, for the escrow agreement to which we have referred shows that these notes had been delivered under the agreement to the Trust Company, and when the Trust Company was authorized to return Shelensky's money to him, they were directed over the signatures of all the parties to the escrow agreement, to retain the securities. An escrow officer of the Trust Company appeared and testified that the notes were still in the possession of the Trust Company. The decree finds that these notes "are now in the possession of the defendant Chicago Title & Trust Company and ought to be cancelled and delivered up to the makers, "and by the terms of the decree the Trust Company is restrained from parting with the custody of these notes; and the defendant Grossman, as trustee, is ordered to execute and deliver a release of the trust deed, which had been given by the Paces in connection with those notes. Although this specific relief had not been prayed for in the bill, it was entirely proper to provide for it in the decree, under the prayer for general relief. It is complained that it was error to direct the release of this trust deed without ordering a cancellation of the notes. As already pointed out, the decree specifically finds that the notes should be cancelled and delivered up to the makers, and we assume that such a course would be a necessary part of the operation involving the release of the trust deed.

It is claimed that the trustee under the first mortgage and the agents appointed as collectors of the sinking fund, set up to meet the first mortgage bonds as they came due, were unnecessarily parties. In our opinion this contention is without merit. They were proper parties.

were not necessary parties to the complainant's bill, for the escrow agreement to which we have referred shows that these notes had been delivered under the agreement to the Trust Company, and when the Trust Company was authorized to return Shelenskiy's money to him, they were directed over the signatures of all the parties to the escrow agreement, to retain the securities. An escrow officer of the Trust Company appeared and testified that the notes were still in the possession of the Trust Company. The decree finds that these notes "are now in the possession of the defendant Chicago Title & Trust Company and ought to be cancelled and delivered up to the maker," and by the terms of the decree the Trust Company is restrained from parting with the custody of these notes; and the defendant Grossman, as trustee, is ordered to execute and deliver a release of the trust deed, which had been given by the Pacos in connection with those notes. Although this specific relief had not been prayed for in the bill, it was entirely proper to provide for it in the decree, under the prayer for general relief. It is complained that it was error to direct the release of this trust deed without ordering a cancellation of the notes. As already pointed out, the decree specifically finds that the notes should be cancelled and delivered up to the maker, and we assume that such a course would be a necessary part of the operation involving the release of the trust deed.

It is claimed that the trustee under the first mortgage and the agents appointed as collectors of the sinking fund, set up to meet the first mortgage bonds as they came due, were unnecessarily parties. In our opinion this contention is without merit. They were proper parties.

We find no error in that part of the decree fixing the attorney's fees at $4,000.00 or taxing two fifths of the costs against the appellant.

It is further contended that even if all the evidence in this case is believed to be true except that produced by Harnstrom and his witnesses, the decree should be reversed because it is inequitable and unjust in that it does not require the repayment of $30,000.00 with interest at 7 per cent to Harnstrom but only $25,000.00 with interest at 5 per cent. In view of all the evidence in this record we are of the opinion the decree as entered was in all respects equitable and just.

It is finally urged that there is every evidence of collusion between the Paces and the complainant Lill, such as should bar either of them from any standing in a court of conscience or from receiving any equitable relief. We agree with the finding specifically noted in the master's report on this point, to the effect that "no collusion between the said Lill and Pace has been established." In our opinion there is no analogy between the situation disclosed in Casper National Bank v. Jenner, 268 Ill. 142, to which counsel have called our attention on this point, and that presented here. If the Paces found themselves in a situation where they were unable to get the title to their property in such shape as was necessary to get a title guarantee policy, demanded by one who was ready to make a sufficient loan to clear off all the encumbrances against the property junior to the first mortgage, and without such loan they were not in a

We find no error in that part of the decree fixing the attorney's fees at $4,000.00 or taxing two fifths of the costs against the appellant.

It is further contended that even if all the evidence in this case is believed to be true except that produced by Hartsfield and his witnesses, the decree should be reversed because it is inequitable and unjust in that it does not require the repayment of $30,000.00 with interest at 7 per cent to Hartsfield but only $8,000.00 with interest at 3 per cent. In view of all the evidence in this record we are of the opinion the decree as entered was in all respects equitable and just.

It is finally urged that there is every evidence of collusion between the Paces and the complainant Lill, such as should bar either of them from any standing in a court of conscience or from receiving any equitable relief. We agree with the finding specifically noted in the master's report on this point, to the effect that "no collusion between the said Lill and Pace has been established." In our opinion there is no analogy between the situation disclosed in Cooper National Bank v. Jenner, 288 Ill. 142, to which counsel have called our attention on this point, and that presented here. If the Paces found themselves in a situation where they were unable to get the title to their property in such shape as was necessary to get a title guarantee policy, demanded by one who was ready to make a sufficient loan to clear off all the encumbrances against the property junior to the first mortgage, and without such loan they were not in a

position to pay the amount called for on the loan from Harnstrom, and Harnstrom, as is apparent from this record, came to take the position with regard to this transaction which he endeavored to establish in this case; and if Lill, who had become the owner of the junior mortgages, was not disposed to be unfriendly to them; and if in taking the action he has taken in prosecuting this foreclosure suit, Lill was thereby disposed to not only protect his own interests, as such action unquestionably did, but also save the Paces from an entire loss of their equity in the property and make it possible for them, with the additional time thereby resulting, to make a further effort to make such provision for the payment of the amounts found due to Lill and Harnstrom under this decree, we are unable to see how any harm is thereby done to any of the parties, nor, in our opinion, may such a situation be reasonably said to be in any way inconsistent with the proper conscience of a court of equity.

For the foregoing reasons, the decree of the Superior Court is affirmed.

DECREE AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

position to pay the amount called for on the loan from Hartstrom, and Hartstrom, as is apparent from this record, came to take the position with regard to this transaction which he endeavored to establish in this case; and if Hill, who had become the owner of the junior mortgage, was not disposed to be unfriendly to them; and if in taking the action he has taken in prosecuting this foreclosure suit, Hill was thereby disposed to not only protect his own interests, as such action undoubtedly did, but also save the pecos from an entire loss of their equity in the property and make it possible for them, with the additional time thereby resulting, to make a further effort to make such provision for the payment of the amounts found due to Hill and Hartstrom under this decree, we are unable to see how any harm is thereby done to any of the parties, nor, in our opinion, may such a situation be reasonably said to be in any way inconsistent with the proper conscience of a court of equity.

For the foregoing reasons, the decree of the Superior Court is affirmed.

MORRIS AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

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PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, v. HELEN JANKOWSKI, Plaintiff in Error.	ERROR TO CRIMINAL COURT, COOK COUNTY.

Opinion filed March 2, 1927.

MR. JUSTICE THOMSON delivered the opinion of the court.

The defendant, Helen Jankowski, was indicted for mayhem. There were two counts in the indictment, one charging her with assault with intent to commit mayhem, and the other charging her with destroying the eye sight of one Joseph Krysinski with malicious intent to maim or disfigure him. The jury found the defendant guilty and fixed her punishment at one year in the County Jail and a fine of $1,000.00. Judgment having been entered on that verdict, the defendant has sued out this writ of error.

The defendant contends that the evidence failed to establish her guilt, beyond all reasonable doubt. The record shows that the defendant had been running a small candy store. The complaining witness Joseph Krysinski, was apparently in the candy business, selling to stores, and he had been selling candy to the defendant for some time. The testimony introduced by the prosecution tends to show that the defendant sold her store to a woman named Antonia Drozdik and that at that time she owed Krysinski a balance of $36.75; that she later paid him $20.00 of that amount; that at one

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

HELEN JANKOWSKI,
Plaintiff in Error.

ERROR TO
CRIMINAL COURT,
COOK COUNTY.

Opinion filed March 5, 1947.

MR. JUSTICE THOMSON delivered the opinion of the court.

The defendant, Helen Jankowski, was indicted for mayhem. There were two counts in the indictment, one charging her with assault with intent to commit mayhem, and the other charging her with destroying the eye sight of one Joseph Krysinski with malicious intent to maim or disfigure him. The jury found the defendant guilty and fixed her punishment at one year in the County Jail and a fine of $1,000.00. Judgment having been entered on that verdict, the defendant has sued out this writ of error.

The defendant contends that the evidence failed to establish her guilt, beyond all reasonable doubt. The record shows that the defendant had been running a small candy store. The complaining witness Joseph Krysinski, was apparently in the candy business, selling to stores, and he had been selling candy to the defendant for some time. The testimony introduced by the prosecution tends to show that the defendant sold her store to a woman named Antonia Drozdik and that at that time she owed Krysinski a balance of $55.75; that she later paid him $50.00 of that amount; that at one

time she went back to her store and asked Mrs. Drozdik if she was still buying candy from Krysinski, and finding that she was, the defendant asked her to tell him to come over to her house and get the balance she owed him - writing her address on a card and leaving it with Mrs. Drozdik for the latter to give to Krysinski. The state's evidence tends further to show that Krysinski went to her house several times in August, 1925, to get his money, but the defendant claimed she was unable to pay it and asked him to come later. The evidence further is to the effect that one Saturday afternoon in September, 1925, Krysinski was out in a new automobile truck he had bought, receiving instructions on the driving of it from a chauffeur in the employ of the truck company who had sold him the truck, and they passed the defendant on the street, and at her signal stopped, and she and Krysinski had some conversation, in which she asked him to come over to the house and she would pay him the money, and it was arranged that he come over the following afternoon, which was Sunday, September 27. Krysinski testified that he went to the defendant's home at that time and knocked on the door; that the door was opened a few inches and he saw the defendant standing inside, but the door was not opened fully, but closed again and locked; and that after a few minutes it was again opened, and suddenly some liquid was thrown over his head and face, which blinded him; that heturned and left, making his way to a place about a block away, where there was some water, where he tried to wash his eyes and face; that he was unable to see anything clearly, saying that objects looked as though he were looking through tissue paper. He then testified that he went home; was cared for by several doctors, without success, and then was an inmate of a hospital

time she went back to her store and asked Mrs. Dreadik if she was still buying candy from Kryzanek, and finding that she was, the defendant asked her to tell him to come over to her house and get the balance she owed him - writing her address on a card and leaving it with Mrs. Dreadik for the latter to give to Kryzanek. The state's evidence tends further to show that Kryzanek went to her house several times in August, 1928, to get his money, but the defendant claimed she was unable to pay it and asked him to come later. The evidence further is to the effect that one Saturday afternoon in September, 1928, Kryzanek was out in a new automobile truck he had bought, receiving instructions on the driving of it from a chauffeur in the employ of the truck company who had sold him the truck, and they passed the defendant on the street, and at her signal stopped, and she and Kryzanek had some conversation, in which she asked him to come over to the house and she would pay him the money, and it was arranged that he come over the following afternoon, which was Sunday, September 27. Kryzanek testified that he went to the defendant's home at that time and knocked on the door; that the door was opened a few inches and he saw the defendant standing inside, but the door was not opened fully, but closed again and locked; and that after a few minutes it was again opened, and suddenly some liquid was thrown over his head and face, which blinded him; that he turned and left, making his way to a place about a block away, where there was some water, where he tried to wash his eyes and face; that he was unable to see anything clearly, saying that objects looked as though he were looking through tissue paper. He then testified that he went home; was cared for by several doctors, without success, and then was an inmate of a hospital

for seven weeks, without improving, after which he went to a Dr. Kraft. This latter doctor testified that Krysinski was totally blind and always would be, and that the condition of the eyes as he found them was caused by some caustic or acid. Krysinski was corroborated by the testimony of the chauffeur, who was teaching him to drive his new truck, and of Mrs. Drozdik, who bought the store from the defendant. Krysinski was asked whether he had ever had sexual intercourse with the defendant and he said that he neverhad. He further stated that at the time the acid was thrown, he was not inside the defendant's house. The police officer who arrested the defendant testified that he talked with her at the station and she admitted she had thrown liquid of some kind on Krysinski, and in explanation of this she told him that after Krysinski had been coming to her store for some months, selling candy, he came back into the rear of the store with her and had intercourse with her, and that this had occurred at different times up to the time she sold the store, over a period of four months, after which he visited her at her home and they had intercourse there, up to within about four months before the incident involved in this prosecution. She said that her husband had found out about it and questioned her and at first she would not tell about it, and then he had learned something of it through their eldest child, after which he had again confronted her, and she then told him the truth about it, whereupon her husband told her to get out. The officer further testified that the defendant told him that when Krysinski came to her house on the afternoon of September 27, he knocked on the door and when she answered, "he rushed in and struck me;" that she then screamed and ran to the kitchen and took "a bottle of some stuff I think what my husband used to clean or flush the basins in the toilets,"

for seven weeks, without improving, after which he went to a Dr. Kraft. This latter doctor testified that Kryzanski was totally blind and always would be, and that the condition of the eyes as he found them was caused by some caustic or acid. Kryzanski was corroborated by the testimony of the chauffeur, who was teaching him to drive his new truck, and of Mrs. Drozdik, who bought the store from the defendant. Kryzanski was asked whether he had ever had sexual intercourse with the defendant and he said that he neverhad. He further stated that at the time the acid was thrown, he was not inside the defendant's house. The police officer who arrested the defendant testified that he talked with her at the station and she admitted she had thrown liquid of some kind on Kryzanski, and in explanation of this she told him that after Kryzanski had been coming to her store for some months, selling candy, he came back into the rear of the store with her and had intercourse with her, and that this had occurred at different times up to the time she sold the store, over a period of four months, after which he visited her at her home and they had intercourse there, up to within about four months before the incident involved in this prosecution. She said that her husband had found out about it and questioned her and at first she would not tell about it, and then he had learned something of it through their eldest child, after which he had again confronted her, and she then told him the truth about it, whereupon her husband told her to get out. The officer further testified that the defendant told him that when Kryzanski came to her house on the afternoon of September 27, he knocked on the door and when she answered, "he rushed in and struck me;" that she then screamed and ran to the kitchen and took "a bottle of some stuff I think what my husband used to clean or flush the basins in the toilets."

which she threw at him; that he ran out through the front door and she threw the bottel at him, whereupon she ran out into the backyard screaming and the neighbors called the police. The officer said he saw some white stains around the front door; that he examined the floors and carpets in the house but did not see anything unusual about them.

The defendant lived in a first floor flat and her younger sister and husband lived on the second floor. The two latter testified that they heard her scream for help on the afternoon in question and that the screams came from the direction of the kitchen. A next door neighbor testified that she had seen Krysinski the week before, on Saturday evening talking with the defendant, apparently near the house, for about 15 minutes, when she came in and he walked up and down apparently waiting for her, but she did not come out. She further testified that she had seen Krysinski about there a number of times before on a truck which he would leave standing nearby in front of a grocery store, "and he would be gone fully three quarters of an hour over to her place."

The defendant testified that she never owed Krysinski anything; that after he had been selling her candy at the store for a short time, he began his attempts to be intimate with her and that on one occasion at the store, he followed her out in the kitchen, where she had gone to get some money to pay him for the candy he was delivering, and there he approached her and overcame her resistance and had intercourse with her; that she told him she would have him arrested and he told her if she did anything like that or told anyone abou it, he would kill her and also kill himself. She also testified that on another occasion he had intercourse with her at her

which she threw at him; that he ran out through the front door and she threw the bottel at him, whereupon she ran out into the backyard screaming and the neighbors called the police. The officer said he saw some white stains around the front door; that he examined the floors and carpets in the house but did not see anything unusual about them.

The defendant lived in a first floor flat and her younger sister and husband lived on the second floor. The two latter testified that they heard her scream for help on the afternoon in question and that the screams came from the direction of the kitchen. A next door neighbor testified that she had seen Krysinski the week before, on Saturday evening talking with the defendant, apparently near the house, for about 15 minutes, when she came in and he walked up and down apparently waiting for her, but she did not come out. She further testified that she had seen Krysinski about there a number of times before on a truck which he would leave standing nearby in front of a grocery store, "and he would be gone fully three quarters of an hour over to her place."

The defendant testified that she never owed Krysinski anything; that after he had been selling her candy at the store for a short time, he began his attempts to be intimate with her and that on one occasion at the store, he followed her out in the kitchen, where she had gone to get some money to pay him for the candy he was delivering, and there he approached her and overcame her resistance and had intercourse with her; that she told him she would have him arrested and he told her if she did anything like that or told anyone about it, he would kill her and also kill himself. She also testified that on another occasion he had intercourse with her at her

home. She testified that on September 20, the Sunday before the incident involved here, Krysinski was out in front of the house walking up and down, and her husband asked her what he was doing there and she said he had better ask Krysinski. She said Krysinski had often suggested that she poison her husband, saying that he would poison his wife and then they could be married, and that she said she had her children, and he said, "my people and his people is going to care for my children and his children, and I said no." It appears from the record that at the time the defendant was testifying, in March, 1926, her husband had procured a divorce from her - as the defendant put it - "He say Krysinski is my sweetheart, now I lose my home and my children." The defendant had four children. She said three of them were her husband's. She was asked who the father of the youngest one was and objection to that question was sustained.

On cross-examination she denied ever seeing Krysinski with the truck driver. She also denied ever asking him to come over to her house for his money, saying she never owed him any money. In rebuttal Krysinski took the stand and denied the testimony of the defendant to the effect that he had suggested he would poison his wife and she should poison her husband and then they could live together.

It would seem to be apparent that neither of the principals involved in this case told the truth. No reasonable person would believe that Krysinski went to the defendant's house merely to collect the balance of $16.00, without ever having had any trouble with her, either concerning that small debt or anything else, and that practically out of a

home. She testified that on September 30, the Sunday before the incident involved here, Kryzanski was out in front of the house walking up and down, and her husband asked her what he was doing there and she said he had better ask Kryzanski. She said Kryzanski had often suggested that she poison her husband, saying that he would poison his wife and then they could be married, and that she said she had her children, and he said, "my people and his people is going to care for my children and his children, and I said no." It appears from the record that at the time the defendant was testifying, in March, 1928, her husband had procured a divorce from her - as the defendant put it - "He say Kryzanski is my sweetheart, now I lose my home and my children." The defendant had four children. She said three of them were her husband's. She was asked who the father of the youngest one was and objection to that question was sustained.

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It would seem to be apparent that neither of the principals involved in this case told the truth. No reasonable person would believe that Kryzanski went to the defendant's house merely to collect the balance of $16.00, without ever having had any trouble with her, either concerning that small debt or anything else, and that practically out of a

clear sky she would throw this strong liquid into his face. The defendant showed by her own testimony that she appreciated that whatever this liquid was it was very powerful, because she described that her husband used it with a sort of swab made out of a bunch of cloth wound around a stick.

On the other hand, we see no reason to doubt the testimony of the chauffeur and Mrs. Drozdik, in spite of the defendant's contradictions of their testimony. From all the evidence in the record, we are inclined to believe that Krysinski had been unduly intimate with the defendant. By her own admission, as shown in this record, her husband had procured a divorce from her on that ground, naming Krysinski as a co-respondent, and in that case he had procured the custody of their three children. In his closing argument counsel for the State reasoned to the jury that even if the story told by the defendant, about her intimacy with Krysinsky were true, still she had not related a situation justifying her admitted act of throwing this substance into Kyysinsky's face and blinding him. The jury apparently took that view of the situation, and we are not in a position to say that they were not justified in doing so. While, as already stated, we do not believe that either of these parties told the whole truth, we have reached the conclusion, after a very careful consideration of all the evidence, that we cannot say the jury were not justified in finding the defendant guilty beyond all reasonable doubt.

The only other contention urged by the defendant in this court is that the prosecuting attorney made such a prejudicial and inflammatory argument to the jury as to

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The only other contention urged by the defendant in this court is that the prosecuting attorney made such a prejudicial and inflammatory argument to the jury as to

interfere with her receiving a fair trial. We have examined all of this argument, as it appears in the record. In one or two minor respects the prosecutor misquoted the testimony but not to such an extent as to make this a material matter. Most of the remarks indulged in by him, to which objection was made, were statements which were warranted by the evidence which had been submitted by the prosecution. One or two statements he made were very apparent exaggerations, but, on the whole, we are unable to conclude that the argument was such as to warrant this court in disturbing the finding of the jury. In the course of his remarks he referred to the wife and children of Krysinski. His wife was in court and at that point in the argument she was apparently crying and making such a disturbance that the court interrupted the argument and had her removed from the room, saying that no such demonstration would be permitted. We do not deem that incident sufficiently serious to warrant a conclusion on our part that the defendant's rights were unduly prejudiced. The trial court acted promptly in the matter; he witnessed everything that transpired and was apparently of the opinion that it did not justify setting aside the verdict. There is nothing in the record, relating to this incident, which would warrant this court in overriding the judgment of the trial court concerning it.

Another point is made in the brief involving a question of newly discovered evidence as a basis for a new trial but no mention is made of this matter in the argument presented and it will therefore be deemed to have been waived.

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Another point is made in the brief involving a question of newly discovered evidence as a basis for a new trial but no mention is made of this matter in the argument presented and it will therefore be deemed to have been waived.

For the reasons we have given, the judgment of the Criminal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

For the reasons we have given, the judgment of the Criminal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, J.J. AND O'BRIEN, J., DISSENT.

75 - 31199

SARAH R. WILDE and ESTHER C. RALPH, individually and as assignees of MARGARET A. ALLEN, Appellants, v. THEARLE DUFFIELD FIRE WORKS DISPLAY COMPANY, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed March 2, 1927.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the plaintiffs seek to reverse an order entered in the Municipal Court of Chicago, vacating a default and judgment which they had previously procured against the defendant, in the sum of $12,000.

The plaintiffs brought their action of the first class against the defendant in the Municipal Court of Chicago, and summons was duly issued and served on the defendant, according to the bailiff's return, by leaving a copy with "John Doe, agent, who refused to give his true name, * * * and at the same time informing him of the contents thereof." The defendant failed to appear in response to the summons, and judgment by default was entered in favor of the plaintiffs on January 19, 1926. Within 30 days thereafter, on February 13, 1926, counsel for the defendant filed a special appearance "for the purpose of quashing the summons," and moved the court "to vacate default and judgment and to quash return of summons." This motion was duly entered and continued to March 5, 1926, and on that date further continued

SARAH R. WILKE and KENNETH O. RALEN, individually and as executors of MARGARET A. WILKE,

Appellants,

v.

THEARLE MULTIKLO FIRE WORKS DISPLAY COMPANY,

Appellee.

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to March 19, 1926.

When the cause again came before the court on the date last referred to, counsel for the defendant appeared and asked leave to file a petition under section 21 of the Municipal Court Act. Counsel for plaintiffs then called the court's attention to the motion to vacate, which had previously been made and was still pending. Counsel for the defendant then suggested that he was not estopped from presenting a petition under section 21, merely because the prior motion had previously been made, and in this connection counsel stated to the court, that "that motion may be denied or granted or anything that Your Honor sees fit to do, in your sound discretion. But, nevertheless I am here with a petition," which he then proceeded to urge upon the attention of the court. The record shows that on this day the cause came on for hearing upon the defendant's motion theretofore entered, which motion the court overruled. Next, the record shows that the court granted the defendant leave to file its petition under section 21, to vacate the default and judgment, and upon consideration of said petition the court sustained it and vacated the default and judgment of January 19, 1926, and directed that the defendant file an affidavit of merits within 10 days. From the latter order the plaintiffs have perfected this appeal.

On December 27, 1926, the defendant submitted its motion to dismiss the appeal on the ground that the order appealed from was not a final order, and therefore, not appealable. An order vacating a judgment on a motion made within the term or within 30 days after the entering of the judgment, where the cause is in the Municipal Court of Chicago,

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is not final and is therefore not appealable. But an order vacating a judgment after the term or after the expiration of 30 days from the date of the judgment in the Municipal Court of Chicago, on motion made under section 89 of the Practice Act, or Section 21 of the Municipal Court Act, is final and so appealable. A. L. Clark & Co. v. Charles Levy Co., 219 Ill. App. 656; Gallay v. Mathis, 195 Ill. App. 170; Doyle v. Fallows, 207 Ill. App. 5; Cramer v. Ill. Commercial Men's Association, 260 Ill. 516. The petition filed by the defendant in the case at bar is designated by counsel as a petition filed under the provisions of section 21 of the Municipal Court Act, as is apparent from the petition itself, wherein the petitioner "prays, under the equity powers of this court, conferred by law, that the judgment by default be vacated and set aside." The motion to dismiss the appeal was reversed to the hearing and is now denied, for the reasons above stated.

In our opinion, the trial court erred in entering the order appealed from, vacating the default and judgment pursuant to the petition filed by the defendant under section 21. As this court had occasion to point out in Langner v. Keeshin, 223 Ill. App. 642, and prior thereto in Flora v. Fields, 156 Ill. App. 341, "it is only where the defendant has made no motion to vacate, set aside or modify a judgment within 30 days after the entry of such judgment, that the Municipal Court has jurisdiction to entertain a petition alleging grounds for vacating the judgment, which would be sufficient to cause the same to be vacated by a bill in equity," which is the relief sought by the petition filed by the defendant in the case at bar. Section 21, of the Municipal Court Act, Cahill's Ill. Stat. 1925, ch. 37, par. 409, distinctly

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says that a judgment of the Municipal Court may only be vacated in that court after the expiration of 30 days, by a petition setting forth grounds for vacating, which would be sufficient to cause the same to be so vacated by a bill in equity "if no motion to vacate, set aside or modify any such judgment order or decree shall be entered within 30 days after the entry of such judgment, order or decree." The record in the case at bar shows that within 30 days after the entering of the judgment in favor of the plaintiffs, the defendant did come into count and "move the court to vacate default and judgment and to quash return of summons." The defendant, having done that, was obliged to secure what relief it might from the judgment which had been entered against it, through such motion, and was not in a position, after expiration of the 30 day period, to abandon that motion or suffer it to be denied and then seek relief under section 21. As intimated by this court in Gallay v. Mathis, supra, such a petition as the one involved here, being in the nature of a bill in equity, must show not only a meritorious defense and that the entering of the judgment against which the relief is sought, was without the fault or negligence of the defendant, but it must also set up such facts as will show why the motion to vacate was not made within the period of 30 days, provided by the statute, and that the failure of the defendant to make such a motion within that period, and secure the relief sought in that way, was not due to his negligence. This is in accord with the general theory of equity jurisdiction, which requires one seeking relief in a court of equity to show, as a condition presedent to his right to such relief, that he does not have an adequate remedy at law. Where the statute expressly gives

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the defendant an opportunity of obtaining relief from a judgment at law, by going into that court within a specified period, he may not neglect that remedy or deliberately choose not to avail himself of it, and after the period has run, appeal to the equity jurisdiction of the court to get relief from the judgment entered against him at law. All the reasons open to a defendant in support of a petition in the nature of a bill in equity, seeking the vacation of a judgment, more than 30 days after the judgment was entered, are open to the defendant in support of a motion, made within 30 days. These reasons support the provision of the statute which gives the defendant a right to file his petition after the expiration of the 30 day period, only where no motion to vacate is made within the 30 day period; and in all cases where a petition is filed after a thirty day period has expired, as above stated, it should give satisfactory reasons for the failure of the defendant to make a motion to vacate within the 30 day period. We have no occasion here to pass upon the question of whether the trial court properly denied the motion which the defendant submitted within the 30 days. The defendant neither prayed for nor perfected an appeal from that order.

For the reasons we have given, the order of the trial court, vacating the default and judgment pursuant to petition filed by the defendant under section 21, is reversed and the cause is remanded to the Municipal Court of Chicago, with directions to expunge the order of March 19, 1926, sustaining said petition and vacating the default and judgment of January 19, 1926. Langner v. Keeshin, supra; Price v. Marie, 207 Ill. App. 112. ORDER REVERSED AND CAUSE REMANDED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

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For the reasons we have given, the order of the trial court, vacating the default and judgment pursuant to petition filed by the defendant under section 21, is reversed and the cause is remanded to the Municipal Court of Chicago, with directions to expunge the order of March 19, 1932, sustaining said petition and vacating the default and judgment of January 19, 1932. Lumpkin v. Joseph, supra; Price v. Wells, 307 Ill. App. 112.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

ORDER REVERSED AND CAUSE REMANDED.

61 - 31185

JAMES A. BROPHY, Defendant in Error,	)	
	)	ERROR TO THE SUPERIOR COURT
vs.	)	OF COOK COUNTY.
BERTHA FEIGEN et al., Plaintiffs in Error.	)	

244 I.A. 634[3]

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

Complainant by his bill sought the removal of certain instruments as clouds upon his title to certain lots, the surrender of certain deeds to him, and permission to retain $10,000 paid by defendant Bertha Feigen to him as earnest money on account of her alleged breach of contract for the purchase of real estate. Answers were filed and the cause was referred to a master in chancery to take evidence and report conclusions. After hearing evidence, he recommended that a decree be entered in accordance with the petition of complainant's bill. Objections and exceptions thereto having been over-ruled, the chancellor entered a decree accordingly, which the defendants Bertha Feigen and Philip Feigen by this writ of error seek to have reversed.

In December, 1923, complainant was the owner of 308 lots in Cook county, Illinois. Under date of December 27, 1923, he entered into a contract with Bertha Feigen to sell her these lots for $100,000. She paid $10,000 as earnest money and agreed to pay the further sum of $5,000 on or before February 1, 1924, $5,000 on or before March 1, 1924, and $10,000 on or before April 1, 1924, the balance of the purchase price of $70,000, to be secured by a mortgage on the premises. The conveyance to the purchaser was subject to all taxes and assessments levied after the year 1923 to any unpaid special taxes or special assessments for improvements,

and to unpaid instalments of special assessments falling due after January 1, 1924, levied for improvements completed. Complainant was to furnish a merchantable title guaranty policy within a reasonable time. The contract also provided that if material defects were found and reported and not cleared within sixty days after found, the purchaser might, at her option, upon notice given to the vendor, declare the contract null and void and have the earnest money returned to her, or she might elect to take the property as it then was and complainant was to convey as agreed. In default of her election to perform, the purchaser was to be deemed to have abandoned any claim upon the premises and the contract was to cease to be of any force and effect. It was also provided that should the purchaser fail to perform the contract within the time and in the manner specified, the $10,000 earnest money should, at the option of the vendor, be retained by him as liquidated damages and the contract become null and void. Time was declared to be of the essence of the contract and of all its conditions.

Subsequently, about January 16, 1924, a supplemental or escrow agreement was entered into which modified somewhat the provisions of the original agreement in this respect - it was provided that the $70,000 purchase money mortgage should be divided and placed on various specified lots; also that the $5000 payable on February 1st and March 1st respectively, and the $10,000 payable April 1, 1924, instead of being made payable to complainant, were to be deposited by the purchaser with the Chicago Title & Trust Company in escrow. Complainant was to execute and place in escrow his deeds of conveyance, which was done, and the purchaser agreed to and did deposit $59,750 purchase money notes. Instead of complainant furnishing a

guaranty title policy in the sum of $100,000, the escrow provided that, when all of the deposits were made, the warranty deeds deposited by complainant and the trust deeds deposited by the purchaser should be filed for record, and when the Chicago Title & Trust Company should be prepared to issue an owner's policy guaranteeing the title of Bertha Feigen for $130,000, subject to the trust deeds, then the Trust Company was authorized and directed to pay complainant the $20,000 representing the aggregate of the payments which the purchaser agreed to make on the first days of February, March and April, 1924, respectively.

Complainant immediately proceeded to carry out his agreements with reference to his title. Mrs. Feigen failed to make the $5,000 payments due February 1st or March 1st, or the $10,000 payment due April 1st. None of these payments was ever made. January 26, 1924, Mrs. Feigen entered into articles of agreement with certain other parties, in which she described herself as the owner of and having escrow title to the premises. This instrument was recorded April 3, 1924, and is one of the documents which the decree removes as constituting a cloud. Various deeds were obtained and recorded, clearing up complainant's title.

Defendants argue from the contents of certain letters called opinions of title, from the Chicago Title & Trust Company, that the complainant did not clear up objections to his title. These letters, upon the hearing before the master, were marked for identification, but the record shows that they were never introduced in evidence. However, it appears that some of the objections in these letters were waived by the Chicago Title & Trust Company and the complainant testified that all of the objections had been "cleaned up."

The record justifies the finding of the master that the title to said premises was in the complainant and that the Chicago Title & Trust Company was ready to issue guaranty policies guaranteeing the title to said premises as provided in the escrow agreement. In the meantime Mrs. Feigen recorded the copy of her contract with complainant, and divers judgments were entered against her in favor of certain defendants. July 17, 1924, complainant served Bertha Feigen with written notice that unless she deposited in escrow the instalments in arrears aggregating $20,000 by noon of July 23, 1924, he would declare the contract terminated and the earnest money, $10,000, forfeited as liquidated damages. She failed to respond, and on July 28, 1924, there was served on her a notice declaring the contract at an end and the earnest money forfeited as liquidated damages. Notice was given to the Chicago Title & Trust Company demanding the return to complainant of the warranty deeds deposited in escrow.

Defendants concede that the contract should be declared null and void, but insist that equity requires the return to Mrs. Feigen of the $10,000 earnest money. We do not so conclude. This is not a case of a vendor unable to make title or refusing to convey in accordance with the contract. The evidence shows that he was able to make title and that his deeds were in escrow with the Chicago Title & Trust Company. It is a clear case of the proposed purchaser defaulting in respect to the payments which she had agreed to make, namely, $5000 on February 1, 1924, $5000 on March 1, 1924, and $10,000 on April 1, 1924. Time was made the essence of the contract and of its conditions. She failed to make the required payments and she must be charged with the result of her failure.

It should be noted that by the agreement for the escrow, the title guaranty policy was not to run to the complainant but

was to run to Mrs. Weigen. The Trust Company was ready to issue such policies, and it was her failure to make the payments which prevented the performance of the agreement.

Defendants argue that the fact that the contract provides that the $10,000 earnest money shall be retained as liquidated damages is not necessarily binding and that under certain circumstances money so deposited will be treated as a penalty and actual damages only allowed. We construe this contract to provide that the earnest money shall be retained as liquidated damages, but even considered as a penalty, the evidence justifies the decree in this respect. Complainant paid $5000 as a broker's commission on this prospective sale, also taxes for 1924 amounting to $1500 and special assessments amounting to over $17,000, which by the contract the vendee assumed. Also there is the lost interest on the balance of the purchase price.

We do not dispute the legal propositions presented by the defendants, but they are not applicable to the facts of this case. The decree is justified by the record and it is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

146 - 31276

NICK PALZKILL,
Appellant,

vs.

RAY CHAMBERS and W. H. CHAMBERS,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

244 I.A. 634

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order vacating and setting aside a judgment against W. H. Chambers, one of the two defendants.

The summons was issued against both defendants and was served on Ray Chambers, but returned "not found" as to W. H. Chambers A general appearance was filed by Harry Weintraub, an attorney then duly licensed to practice law in this state, although it has been called to our attention that he was subsequently disbarred by the Supreme court.

December 17, 1925, plaintiff had judgment against both defendants for $3,000. June 22, 1926, which was at a subsequent term of court, defendant W. H. Chambers filed a motion and petition alleging that he did not know said Harry Weintraub who filed his general appearance in said cause, and that he never authorized him to represent him nor authorized any other attorney to appear for him in said cause; that he first learned on June 18, 1926, that Harry Weintraub had entered his appearance and that the first knowledge he had of the pendency of said suit or the judgment against him was on June 17, 1926, when it was called to his attention by William Slack, his attorney; he asked that the judgment be vacated and set aside and that he be allowed to file his appearance and plead. Due notice of said motion and petition was served on the attorney for plaintiff. July 17, 1926, the court ordered that the judgment

against W. H. Chambers be vacated and set aside, and from this order plaintiff appeals.

Defendant Chambers has moved that this appeal be dismissed, suggesting that the order is not a final and appealable one. While there are cases holding that such an order made within the term is not final, yet it is now established that such a motion, to correct errors of fact, made after term time, is a proceeding under Section 89 of the Practice Act, and is a new suit, and the order therein is final and appealable. Harris v. Chicago House Wrecking Co., 314 Ill. 500, and cases therein cited. The motion to dismiss has therefore been denied.

Defendant's motion presented a question of fact for the decision of the court, which held in effect that the appearance of W. H. Chambers was unauthorized, and as he had never been served with summons he could not properly be subjected to the judgment rendered.

The record in this case comes squarely within the ruling in Harris v. Chicago House Wrecking Co., supra, where it is held that "the petition or motion must be considered as a declaration in a new suit brought under Section 89." Applying the language of that case to the instant record, it is immaterial whether the declaration on its face discloses such errors of fact as would be sufficient to recall the judgment.

> "Appellee" (plaintiff in the instant case) "failed to raise any question of law concerning the sufficiency of this declaration by demurring to it or by filing a plea of nulle est erratum or by motion to dismiss. We have held that such is the proper practice, and that where the sufficiency of a declaration is not questioned in the above manner or by some other proper mode recognised to test the validity thereof, on appeal no question of law can arise in the Appellate court or in this court as to the sufficiency of the declaration. We have also indicated that it is incumbent upon a party to plead to the declaration in some manner, and if he is satisfied with the sufficiency of the declaration or motion and allegation of

[illegible] v. U. Cranfors be vacated and set aside, and from this order plaintiff appeals.

Defendant Chandler has moved that this appeal be dismissed, suggesting that the order is not a final and appealable one. While there are cases holding that such an order made within the term is not final, yet it is now established that such a motion, to correct errors of fact, made after term time, is a proceeding under Section 99 of the Practice Act, and is a new suit, and the order thereon is final and appealable. Martin v. Mutual Lumber Investment Co., 114 Ill. 499, and cases therein cited. The motion to dismiss has therefore been denied.

Defendant's motion presented a question of fact for the decision of the court, which held in effect that the signature of W. H. Cranfors was genuine, and as he had never been served with summons he could not properly be subjected to the judgment rendered.

The record in this case comes squarely within the ruling in Martin v. Chicago Lumber Company Co., supra, where it is held that "the petition or motion must be considered as a commencement of a new suit brought under Section 99." Applying the language of that case to the instant record, it is immaterial whether the decisions on the issues disclosed such errors of law as would be sufficient to reach the judgment.

"Question" (plaintiff in the instant case) "failed to raise any question of law concerning the sufficiency of this declaration by demurring to it or by filing a plea or motion in arrest or by motion to dismiss. We have held that such is the proper practice, and that where the sufficiency of a declaration is not questioned in the above manner or by some other proper mode recognized to test the validity thereof, no appeal on question of law can arise in the Appellate court or in this court or in the sufficiency of the declaration. We have also indicated that it is incumbent upon a party to plead to the declaration in some manner, and if he is satisfied with the sufficiency of the declaration or motion and allegations of

facts he should file a plea denying the truth of the facts stated in the declaration. There was no demurrer or plea to the declaration shown in this record. There is no counter-affidavit denying the facts. There is no demurrer to the evidence or sworn statement as to the facts made by appellant's attorney. " * *

And further on page 507 the court said:

"As the case stands, no question of law is presented on this record either as to the declaration or as to the sufficiency of the evidence. It was purely a question of fact as to whether or not there was an error of fact committed by the court which culminated in a judgment or order dismissing the suit, and appellee has preserved no record entitling it to review or question the facts. There is therefore no question properly before this court as to whether or not the declaration stated, or whether the evidence proved, an error of fact in the former proceedings in support of the judgment or order. The court pronounced judgment against the appellee and entered the order aforesaid, and it must be considered as without contest on the part of appellee, because the record does not disclose properly any defense or any objection to the court's order. In order to preserve for review a ruling upon objections of a party, whether the same be as to the jurisdiction of the court or otherwise, such objections must be preserved by a bill of exceptions or its equivalent, under our Practice Act. Such objections or exceptions cannot be preserved by mere recitals in the judgment or order. Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61."

This opinion disposes of all the points raised on the instant appeal, and the order is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

176 - 31308

GREGORY T. VAN METER, Administrator of the Estate of Chester Czajkowski, Deceased, Appellant, vs. CHICAGO VARNISHED TILE CO., a Corporation, Appellee.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

244 I.A. 634

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

Chester Czajkowski while employed by defendant received injuries in a fight with a fellow employee which resulted in his death. The administrator of his estate brought suit alleging that decedent was over fourteen years of age and under sixteen years of age and was illegally employed by defendant, which did not secure an employment certificate, thereby violating section 45, chapter 48, Illinois Statutes, and as a result and consequence of such illegal employment and arising out of same, plaintiff's intestate sustained physical injuries from which he died, leaving surviving his father, mother, brothers and sisters. Upon the trial, at the conclusion of plaintiff's case, the court instructed the jury to find the defendant not guilty, and from the judgment on the verdict plaintiff appeals.

Defendant operates a wall paper factory, in which the intestate was employed. The evidence as to his age is not definite, but it may be conceded that at the time in question he was between fifteen and sixteen years old. Defendant did not secure and place on file a certificate as required by the Child Labor Act. Decedent was employed as a "stick boy." His work was to carry a box filled with "sticks," which are about thirty-six

inches long and the diameter of a lead pencil, for a distance of about fifteen feet and place them in a stick holder. His mother knew that he worked for defendant and she was also told about the kind of work he did there. Sometimes he gave his pay-check to his mother and sometimes to his father.

Alex Kaminski was an employee of the defendant; he folded paper and stamped it. On the morning of March 26, 1924, Kaminski was away from his place of duty for a few minutes and another employee substituted for him. Decedent left his work as a "stick boy" and went near Kaminski's machine. A bad roll of paper came out of one of the machines and the substitute by mistake placed it on a pile of good rolls. When Kaminski returned he saw the bad roll of paper with the good rolls and thereupon placed it with the bad rolls. Decedent then took it from the pile of bad rolls and placed it with the good rolls. Kaminski again took it from the pile of good rolls and replaced it with the bad rolls and admonished decedent to "mind his own business." There were further words between them, although the evidence is indefinite as to what was said and by whom. One witness testified that decedent said, "We will have it out," and then went back to his own work. Kaminski and decedent were about the same weight and height.

In the afternoon decedent told another employee, Vasalowski, that he had had a quarrel with Kaminski and that he was going to have a fight with him outside. Usually when decedent left defendant's factory after the day's work was over, he turned to the right and started homeward on a walk leading directly to the street, but this evening he handed Vasalowski his overcoat, cap and lunch box, and after going outside they turned to the left and walked about twenty feet, where they waited for Kaminski,

Hammer long and the diameter of a lead pencil, for a distance of about fifteen feet and place them in a stick holder. His mother knew that he worked for defendant and she was also told about the kind of work he did there. Sometimes he gave his paycheck to his mother and sometimes to his father.

Alex Kaminski was an employee of the defendant; he filled paper and stamped it. On the morning of March 8th, 1978, Kaminski was away from his place of duty for a few minutes and another employee substituted for him. Defendant left his work at a "stick boy" and went near Kaminski's machine. A bad roll of paper came out of one of the machines and the substitute by mistake placed it on a pile of good rolls. When Kaminski returned he saw the bad roll of paper with the good rolls and therefore placed it with the bad rolls. Defendant then took it from the pile of bad rolls and placed it with the good rolls. Kaminski again took it from the pile of good rolls and replaced it with the bad rolls and admonished defendant to "mind his own business." There were further words between them, although the evidence is inconclusive as to what was said and by whom. One witness testified that defendant said, "I will have it out," and then went back to his own work. Kaminski and defendant were about the same weight and height.

In this afternoon defendant told another employee, Vesselowski, that he had had a quarrel with Kaminski and that he was going to have a fight with him outside. Usually when defendant left Schmidt's factory after the day's work was over, he turned to the right and walked home on a walk leading directly to the street, but this evening he headed Vesselowski his overcoat, cap and lunch box, and after going outside they turned to the left and walked about twenty feet, where they waited for Kaminski,

who came out of the building about half a minute later. Vesalowski testified that as Kaminski came up, decedent had his "pose up" and they started to fight. A few blows were struck when decedent fell or was knocked down and died within a short time.

Defendant asserts that the record fails to disclose that the death occurred in Illinois. The statute gives no right of action for a death from a wrongful act occurring out of the state. Wall v. Chesapeake & Ohio Ry. Co., 290 Ill. 227. It is necessary not only to allege, but it must also be proved, that the death occurred in Illinois. Plaintiff does not point out anywhere in the record where this fact is established. Rost v. Noble & Co., 316 Ill. 357; Walton v. Fryer, 276 Ill. 563; Kenney v. Loyal Order of Moose, 285 Ill. 188; Dougherty v. American McKenna Co., 255 Ill. 369.

The evidence also fails to show that the alleged illegal employment was the proximate cause of the death. Causal connection between the negligence shown or the illegal act and the injury complained of must always be shown, and while violation of certain penal statutes constitutes negligence per se, nevertheless to make such negligence actionable it must be the proximate cause of the injury for which the action is brought. Carterville & Herrin Coal Co. v. Meake, 128 Ill. App. 133; Schlapp v. McLean County Coal Co., 235 Ill. 630. In Revis v. Toledo, St. L. & W. R. R. Co., 147 Ill. App. 116, the court said with reference to the so-called Child Labor Act, that the negligence to be presumed from the employment of a minor within the prohibition of the statute, pertains only to consequences which result from such employment, and that before an employer can be held liable it must be shown that the minor employee was injured by reason of such unlawful employment. McNally v. Standard Ry. Equipment Co., 165 Ill. App. 371; Hartnett v. Boston

Store of Chicago, 265 Ill. 331.

The proximate cause of decedent's death was his participation in an unlawful act in which he was the aggressor. He prepared for the fight by handing his clothes to his comrade and waiting for Kaminski to leave defendant's building after working hours. Under such circumstances he could not maintain an action against his employer for any injuries he might receive in the ensuing fight. If a party suffers injury while violating a law, although the other party is also a transgressor, he cannot recover for the injury if his unlawful act was the cause of the injury. Frye v. C. B. & Q. R. R. Co., 73 Ill. 399; Gilmore v. Fuller, 198 Ill. 130.

Plaintiff's counsel cites a number of cases where compensation was awarded under the Workmen's Compensation Act. We doubt if such cases are precedents in an action like this, but in none of them was the injured party the aggressor, and the award was based on a finding that the altercation or accident causing the injury arose out of the employment. In the instant case the differences between the decedent and Kaminski arose out of the former leaving his usual work and interfering with Kaminski in the proper performance of his duties; but whatever the cause, the fight was a private, personal affair, after working hours, off the premises of the defendant and unrelated to decedent's employment by defendant.

There is also evidence that the decedent's parents knew that he was engaged in this alleged unlawful employment and knowingly permitted it. It has been held in Newton v. Illinois Oil Co., 316 Ill. 416, that if the parents permitted their son to be thus illegally employed they cannot recover as beneficiaries of their own wrong, and that they may not recover damages for his death in an action brought by the administrator of his estate where the illegal act of the parents was a contributing cause of

the death.

We conclude that the trial court properly directed a verdict for the defendant, and the judgment is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

244 - 31576

FRANK FARRELLI, Appellee, vs. PERE MARQUETTE RAILROAD COMPANY, Appellant.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE McBRIDE DELIVERED THE OPINION OF THE COURT.

Defendant by this appeal seeks the reversal of a judgment for $7,000 entered upon the verdict of a jury, upon trial of an action wherein plaintiff sought compensation for injuries received, as alleged, in the course of his employment by defendant. The suit was brought under the Federal Employers' Liability Act. It is conceded that at the time of the occurrence defendant was engaged in interstate commerce.

The vital question is whether or not plaintiff was an employee of defendant, the defendant asserting that he was the servant and employee of an independent contractor.

The accident happened October 2, 1923, near Porter, Indiana. Plaintiff was riding from the bunk houses at Porter furnished to laborers by defendant, on a hand-car furnished by defendant, to the place on the tracks where the laborers, including plaintiff, were engaged in repair work. He and others were propelling the hand-car by the ordinary handles, when the handle used by him broke; he fell off the car and was run over by the hand-car immediately following, receiving the injuries in question. This handle was wood and was rotten inside of the goose-neck or ring in which it was set. The foreman of the gang testified that he had examined this about six months before the accident and reported it to defendant's inspector who promised that he would send in a requisition

for a new hand-car. Plaintiff testified that he had no recollection of ever having ridden on this particular hand-car before the morning of the accident; that he had no prior knowledge of the condition of the handle, and did not know it was rotten until it broke.

About forty men, including plaintiff, were in the gang repairing the tracks. They were spacing the ties, that is, straightening crooked ties, and surfacing, which means if there is a low spot or the joint or center low, they would be lined up and made level.

Defendant presents two contracts covering the time of the accident, which, it asserts, show that this work was being done by general contractors who employed the plaintiff, and that he was not the employee of defendant. The first contract, defendant's Exhibit 1, is dated February 19, 1923; and the other, defendant's Exhibit 2, is dated January 1, 1923. They do not differ in any material respect touching the question under consideration. They are between the Pere Marquette Railroad Company and "W. L. Kellogg and L. W. Grego, both of the City of Chicago, Illinois, organized and operating under the common law of the State of Illinois, doing business as the Kellogg-Grego Railway Service, hereinafter * * called 'Contractors.'"

Defendant argues that the construction of these contracts is a matter of law and that the court should have construed them as establishing the status of the Kellogg-Grego Company as an independent contractor employing plaintiff, and should have instructed the jury accordingly. It is the well established rule that, while the relationship between two parties to a contract may be a question of law, yet as to a third party not a party to it, he is not bound thereby and the contract is merely one of the factors to be weighed along with other facts in determin-

for a new hand-car. Plaintiff testified that he had no reasonable-
tion of ever having ridden on this particular hand-car before the
morning of the accident; that he had no prior knowledge of the
condition of the handle, and did not know it was rotten until it
broke.

About forty men, including plaintiff, were in the
gang repairing the tracks. They were spaced the line, that is,
straightening curved ties, and spiking, which means if there
is a low spot or the joint on another low, they would be lined
up and made level.

Defendant presents two contracts covering the time
of the accident, which, it asserts, show that this work was
being done by general contractors who employed the plaintiff,
and that he was not the employee of defendant. The first con-
tract, defendant's Exhibit 1, is dated February 28, 1923; and
the other, defendant's Exhibit 2, is dated January 1, 1923. They
do not differ in any material respect touching the question under
consideration. They are between the Pere Marquette Railroad Com-
pany and W. I. Kellogg and A. W. Gregg, both of the City of
Chicago, Illinois, organized and operating under the common law
of the State of Illinois, doing business as the Kellogg-Gregg
Railway Service, hereinafter - called 'Contractors.'"

Defendant argues that the construction of these con-
tracts is a matter of law and that the court should have con-
strued them as establishing the status of the Kellogg-Gregg Com-
pany as an independent contractor employing plaintiff, and should
have instructed the jury accordingly. In the well established
rule that, where the relationship between two parties is a contract
or a question of law, yet on the issue party not a party to
it, he is not bound thereby but the contract is merely one of
the factors to be weighed along with other facts in determin-

ing the relationship of an employee. Shoninger v. Mann, 219 Ill. 247; Springer v. Ford, 189 Ill. 430.

In Bristol & Gale Co. v. Industrial Commission, 292 Ill. 16, there is a full discussion of this question, with abundant reference to decisions. From this opinion we gather that an independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order and control of the person for whom he does it and may use his own discretion in things not specified; one who contracts to do a specific piece of work, furnishing his own assistants and executing the work either entirely in accordance with his own ideas or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work. The right to control the work contracted for is an important test in determining the status of an employee, and generally if the employee is under the control of an employer, he is its servant. The fact that an employer may terminate the work by discharging the employee is of considerable weight as tending to show that the employee is not the servant of an independent contractor. The fact as to who furnishes the tools or material should be considered. The mode of payment for the work is an important element to be weighed. The opinion in this case states that it is impossible to lay down a hard and fast general rule or state definite facts by which the status of men working and contracting together can be definitely defined in all cases, and that each case must depend on its own facts, no one feature of the case being determinative, but all must be considered together. In Illinois the weight of authority holds that the right of controlling the manner of doing the work is the principal consideration for determining the relationship.

Referring now to the contracts herein, they provide that the contractors shall "do such ballasting, tie renewing and other work on the line of the Pere Marquette Railway as the Pere Marquette may request." They are to do such other work as they may be directed to do by the Pere Marquette's representative and shall perform all the work to the satisfaction of the chief engineer of the Pere Marquette or his representative. The rate of wages to be paid the laborers is fixed by Clause 3, and the Pere Marquette agrees to pay the "contractors" for any work not included in certain specified items the actual cost plus ten (10) per cent. There are also specified rates for certain work, such as stripping track, $300.00 per mile; moving and placing joint ties on newly laid rails, $100.00 per mile. It was provided that the rate for track labor should not be beyond 43¢ per hour. The Pere Marquette was to furnish free transportation to the men and hand-cars, also bunk cars for housing them. The contract might be terminated by either party on twenty-four hours notice, and if any employee of the "contractors" was unsatisfactory to the Pere Marquette, the chief engineer or his representative, he should be dismissed and his place refilled by another employee satisfactory to the Pere Marquette. It was also provided that any of the work could be cancelled on five days notice.

The Kellogg-Grego Company had an agency or office in Chicago where men applied for work. Plaintiff applied and was given a pass to Porter, Indiana.

Tony Bavara, a sub-foreman, testified that there were forty men in his gang, which included plaintiff; that Bell Daniels was the head foreman or inspector employed by the defendant company; that Daniels gave him orders; "he gave me orders - he told me to go ahead and do what I am to do myself, and he sees the bad ties and marks them, to take them up or do the surfacing; that this tie has

got to go; this place needs surfacing up again, and he told me what I shall do;" ** "If he wanted Farrelli to do something, he would tell him to do it;" ** "If Bell did not like the work of a man on the job, he would come down and tell me to fire the man, and I would fire him;" ** "if the work was not done all right, in connection with the laying of the track, he would come down to me to send some men over to fix it, and I would do it, but he would always come to me and tell me what to do."

Another workman testified that he heard Daniels give orders from time to time on that work, "lots of times;" that he gave orders to Bavara and to the witness; if Bavara was too far away, Daniels "would go to any man and tell him what to do; ** he, the inspector, picked out the places where the track was to be surfaced, and he showed us what kind of work to do; the engineers used to put the stakes up and advise us what we were to do." The engineers were employed by the defendant, which also furnished the material and tools.

A report was made daily to Daniels of the exact number of hours put in by all the men, and Daniels kept track of the time. The men were not paid by the job, but by the hour, and defendant's vouchers show that the work in which plaintiff was engaged at the time of the accident was paid for to the Kellogg-Grego Company upon the basis of the number of men employed and the time.

From these and other facts in evidence, we conclude that plaintiff at the time in question was an employee of the defendant. It is evident that the only interest in the work that the Kellogg-Grego Company had was to furnish labor. They were in fact merely an employment agency and sent out laborers as the defendant might request to perform labor under the control and direction of defendant's representative.

[illegible] to get this place ready, working on again, and he told me what I shall do;" or "If he wanted Dawson to do something, he would tell him to do it;" or "If Dodd did not like the work of a man on the job, he would come down and tell me to fire that man, and I would fire him;" or "If the work was not done all right, in connection with [illegible], Dawson would come down to me to send some man over to fix it, and [illegible] but he would always come to me and tell me what to do."

[illegible] Dawson testified that he heard Donaldson give orders from time to time on that work, "Lots of times;" that he gave orders to Dawson and to the witness; if Dawson was too far away, Donaldson "would go to any man and tell him what to do; he, the inspector, pointed out the places where the trench was to be surfaced, and he showed us what kind of work to do; the men used to put the stones up and advise us what we were to do." The engineers were employed by the defendant, which also furnished the material and tools.

A report was made daily to Donaldson of the number of hours put in by all the men, and details here [illegible] of the time. The men were not paid by the job, but by the hour, and defendant's witnesses show that the work in which plaintiff was engaged at the time of the motor car was paid for to the Kellogg-Dwyer Company from the funds of the number of men employed and the time.

From these and other facts in evidence, we conclude that plaintiff at the time he received his injuries was an employee of the defendant. It is contended that the only interest in the work that the Kellogg-Dwyer Company had was to furnish labor. They were in fact merely an employment agency and sent out laborers as the defendant might request to perform labor under the control and direction of defendant's superintendent.

The very character of the work is such that the defendant could not reasonably leave it to the control or direction of anyone else. It was the familiar work of repairing tracks, straightening the ties and leveling the rails, and upon the faithful performance of this in its details depended the safety of defendant's traffic. It was not a contract with Kellogg-Grege Company to produce a specific result like a bridge,or a building,or a new track, but was the daily work of track maintenance.

In Burke v. City and County Contract Co., 117 N. Y. Supp. 400, the court held that a similar contract was simply one for organizing a working force to be used under the direction of the railway company's engineer. The fact that one of the parties is termed a "contractor in the agreement does not extend the contract to cover matters clearly outside of its scope. It is quite common for men to make these percentage contracts, particularly since the modern influx of foreign laborers, who require a superintendent speaking their language, and they are generally referred to as 'contractors' without anyone supposing they are independent contractors upon the work which is in progress."

In Decatur Railway Co. v. Industrial Board, 276 Ill. 472, it was held that the injured party was an employee of the railroad company for the reason that he was subject to discharge, and that the railroad company had the right to control the manner of doing the work. Other cases supporting this conclusion are Roofing Co. v. Travelers Ins. Co., 300 Ill. 487; Railroad Co. v. Manning, 82 U. S. 649; Madisonville, H. & E. R. Co. vs. Owen, (Ky.) 143 S.W. 421; Chicago, R. I. & P. Ry. Co., v. Bennett, 36 Okla. 358. In Franklin Coal Co. v. Industrial Commission, 296 Ill. 329, it was held that the relationship of the parties was a question of fact to be determined from the evidence, and even if there was a conflict in the evidence the court would not set aside the verdict of the jury unless it was clearly and manifestly against the weight of the

evidence. A large number of other citations might be given; also some holding a contrary view; but each case must be decided upon its peculiar facts guided by general principles above stated.

We would not be justified in disagreeing with the conclusion of the jury that plaintiff at the time he was injured was an employee of the defendant.

Defendant says that plaintiff's remedy was under the Indiana Workmen's Compensation act, and that the evidence shows that he has received compensation under this act. Section 13 of this act provides that an injured employee may claim compensation from his employer but cannot proceed against both employer and some other person at the same time, and cannot collect from both "if compensation is awarded and accepted." While the evidence shows that plaintiff received $13.00 a week for some time after the accident from Kellogg-Grego Company, there is no record of the proceedings of the Industrial Board of Indiana and no evidence that it "awarded" any compensation to plaintiff. The evidence tended to show that proceedings before the Indiana Board were brought by the Kellogg-Grego Company naming the plaintiff as the defendant. The cases cited by defendant were decided before the Indiana Compensation act was amended so as to prohibit an injured party from proceeding against both an employer and another person "if compensation is awarded."

Filing a claim for a compensation does not deprive plaintiff of the right of action under the Federal Employers' liability act. Waters v. Quile, 234 Fed. 532.

Complaint is made of the instructions, but they were in line with plaintiff's theory of the case and there is no reversible error in this respect.

We see no justifiable grounds for reversing the judgment, and it is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

437 - 31569

ISIDORE FRIED, Complainant, vs. FRANK L. EHLSCHLAGER and CAROLINE L. EHLSCHLAGER, Appellees, MORRIS H. JACOBSON and SARAH JACOBSON, Appellants. (On Appeal of SARAH JACOBSON) Defendants.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Isidore Fried filed his bill of interpleader alleging that he had in his hands $2,000 claimed by the defendants severally. Answers were filed and the cause referred to a master in chancery, who after hearing evidence reported that Morris H. Jacobson and Sarah Jacobson were entitled to the money. The other defendants, Frank L. and Caroline L. Ehlschlager, filed objections which were over-ruled but, as exceptions before the chancellor, were sustained. The master's report was disapproved and it was decreed that the Ehlschlagers were entitled to the fund. From this Sarah Jacobson has appealed.

The controversy arises out of a contract for exchange of properties. There is very little dispute as to the facts. Defendant Morris Jacobson purchased the building in question in September, 1922. It consisted of twenty-one flats above the basement and two flats of five and four rooms, respectively, in the basement. The five room flat was completed, and Jacobson testified that the construction of the four room flat had been started when he bought the building; that the rough plumbing was in, "the layout was there," and part of the partitions were in. On March 1, 1923, the

Ehlschlagers as parties of the first part and the Jacobsons as parties of the second part, entered into a contract for the exchange of real estate, which among other things contained this provision:

> "Party of the second part agrees to complete a four room flat now in course of construction at a price of $2,000 in addition to $115,000 aforesaid. Said $2,000 to be placed in escrow, said escrowee to be agreed upon between parties hereto at close of deal. Said escrowee to pay said sum of $2,000 to the party of the second part when said flat is completed and all waivers delivered to said escrowee."

The escrowee chosen was Isidore Fried, the complainant. At the date of the contract the rough plumbing and rough plaster of the four room flat were completed, the partitions and the floors, except a hardwood floor, were in; there remained to be done the hardwood floor, the hard finish plaster, installing plumbing fixtures and electric lights.

The master found that immediately after signing the contract the Jacobsons proceeded to complete the four room flat and paid all the bills for the work and secured waivers of lien. The work was completed about April 15, 1923, and a few days thereafter Jacobson notified Ehlschlager that the flat was completed and requested that the $2,000 left in escrow be paid to him. The Ehlschlagers made no objection to the work except as to the kind of glass in the basement windows. Mrs. Ehlschlager wanted clear instead of frosted windows, and Jacobson agreed to and did make the change within a few days. The master found that Jacobson had delivered to Fried, the escrowee, receipted bills and waivers of lien from contractors and materialmen and that no claim for unpaid material or labor bill or lien had been made.

The Ehlschlagers claimed in their answer that Jacobson did not get the work approved by the Building and Health Departments of the City of Chicago, which had refused to allow the flats to be occupied for living purposes, but the master found

Hillenbrand as partner of the first part and the Jacobsons as parties of the second part, entered into a contract for the exchange of real estate, which among other things contained this agreement:

> "Party of the second part agrees to remodel a four room flat now in course of construction at a price of $3,000 in addition to $12,000 already paid. Said $3,000 to be placed in escrow, said escrow to be agreed upon between parties hereto at close of deal. Said escrow to pay said sum of $3,000 to the party of the second part when said flat is completed and all waivers delivered to said escrow."

The escrowee also saw Jackson-Wiley, the contractor. At the date of the contract the rough plumbing and rough electric of the four room flat were completed, the partitions and the floors, except a hardwood floor, were in; there remained to be done the hardwood floor, the hard finish plaster, installing plumbing fixtures and electric lights.

The master found that immediately after signing the contract the Jacobsons proceeded to complete the four room flat and paid all the bills for the work and received waivers of lien. The work was completed about April 1st, 1924, and a few days thereafter Jackson notified Hillenbrand that the flat was ready and requested that the $3,000 left in escrow be paid to him. The Hillenbrands made no objection to the work except as to the size of glass in the basement windows. Mrs. Hillenbrand wanted larger instead of frosted windows, and Jacobson agreed to and did make the change within a few days. The master found that Jacobson had delivered to Wiley, the contractor, receipted bills and waivers of lien from contractors and material-men and had to claim for small material or labor bill or lien had been made.

The Hillenbrands claimed in their answer that Jacobson did not get the work approved by the Building and Health Department of the City of Chicago, which had refused to allow the flat to be occupied for living purposes, but the master found

and concluded that Jacobson was not required by his contract to get the work approved by the Building or Health Departments and did not agree to obtain permits from the City of Chicago. The master found that the Jacobsons had completed the four room flat in compliance with their contract agreement, and that they were entitled to receive the $2,000 held in escrow and recommended the entry of a decree in accordance with such findings and conclusions.

It is argued here that Jacobson was bound by the contract to procure the permits and certificates from the City of Chicago. It is said that the chancellor was of this opinion in decreeing against the Jacobsons. We are of the opinion that the conclusions of the master in this respect were proper. The only condition named in the contract was the completion of the work already started in the four room flat. It is not denied that the Jacobsons did this. Nowhere in the contract is there any provision or obligation upon the Jacobsons to procure permits or certificates from the City.

It is strongly argued that the contract is invalid on the ground that it contemplated a violation of the building ordinances of the city. The Ehlschlagers are not in a position to question the validity of the contract. They do not offer to return the property they have received nor to put the parties back into their original positions. In effect, their claim is that they are entitled to retain all the benefits of their contract without paying for the work done on the four room flat.

A further consideration supporting our conclusion is that none of the work which remained to be done when the contract of exchange was made and which was subsequently done by the Jacobsons was in violation of any of the city ordinances. The floors, plumbing and lighting fixtures and hard finish plaster added by the Jacobsons were all in compliance with the city ordinances. A city

inspector testified that the flat did not conform to the ordinances in the distance between the floor and the ceiling and the size of the rooms. These conditions not only existed at the time Jacobson bought the building but also at the time the Ehlschlagers examined the building and entered into the contract. The Ehlschlagers knew the size of the rooms and the height of the ceiling fully as well as did the Jacobsons, so that if there was any violation in these particulars, the Ehlschlagers are as much chargeable with knowledge of the facts as were the Jacobsons.

It has been held in many cases that, if the work is done in compliance with the contract of employment, the contractor is entitled to his compensation although the work when finished may not meet the approval of the public authorities. Fox v. Rogers, 171 Mass. 546; Michael v. Bacon, 49 Mo. 474; Wood v. Casserleigh, 97 Am. St. Rep. 138; Barry v. Capen, 151 Mass. 99; Dunlop v. Mercer, 156 Fed. 545; Howard v. Lebby, 197 Ky. 324; Morse v. Maurer, 35 Pa. Sup. Ct. 196.

In some minor details the work done by Jacobson is criticized, but we agree with the conclusion of the master that there was a substantial compliance with the contract and that under its terms the Jacobsons were entitled to the sum held in escrow by Fried.

The decree of the chancellor is therefore reversed and the cause remanded with directions to enter a decree in accordance with the conclusions and recommendations of the Master in Chancery and in accordance with what we have said in this opinion.

REVERSED AND REMANDED
WITH DIRECTIONS.

Matchett and Johnston, JJ., concur.

455 - 31587

PEOPLE OF THE STATE OF ILLINOIS ex rel. NAPOLEON SIMENAS, Appellee, vs. CITY OF CHICAGO et al., Appellants.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

By his petition the relator sought a writ of mandamus to compel the respondents to grant him a beverage license for 3438 Emerald avenue in the city of Chicago, for which application had been made and refused. Respondents answered denying that relator was a person of good moral character and reputation, and asserting that on January 10, 1926, the police officers of the City of Chicago found patrons on the premises drinking moonshine liquor which was kept on the premises for sale. After hearing evidence, the court granted the writ of mandamus ordering a license to be issued, from which order defendants appeal. The relator does not appear to defend the order.

The testimony shows that on January 10, 1926, police officers entered the premises of the relator and found some men with the relator drinking liquor. Another officer testified that he made an investigation and found the relator had been arrested for violating the law forbidding the sale of liquor. It also appears that at one time relator's wife had him arrested.

As the evidence clearly established that the petitioner had violated the law and that his former license had therefore been revoked, we cannot say it was an abuse of discretion for the respondents to deny the issuance of a license. A municipality

cannot be compelled to grant a license where a former license has been revoked for good cause. Harrison v. People, 121 Ill. App. 189.

The relator's testimony as to citizenship is indefinite and unreliable. He claims to have made application, but could not get his second papers because he could not remember either when or the boat on which he came to this country.

It has been repeatedly held that the writ of mandamus will not issue unless the petitioner shows a clear and legal right to it, and that it is the duty of the party against whom the writ is sought to do the act which the petitioner seeks to have performed. People ex rel. Mann v. Department of Public Works and Buildings, 320 Ill. 117.

In view of the evidence as to the violation of the liquor law, petitioner has not shown a clear legal right to the writ of mandamus, and the order awarding it is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett and Johnston, JJ., concur.

466 - 31639

H. L. VETTE, Complainant, vs. WILLIAM H. BROWN et al., Defendants.	
GERALD D. O'NEIL, Plaintiff in Error, vs. EMMET J. CLEARY et al., Defendants in Error.	ERROR TO CIRCUIT COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, Gerald D. O'Neil, seeks to reverse a foreclosure decree, the order of the Circuit court refusing to allow him to file a petition for a bill of review, and also the order issuing a writ of assistance for the premises against him and in favor of Emmet J. Cleary.

The writ of error was originally sued out of the Supreme court, which held that, as a freehold was not involved, it had no jurisdiction and transferred the cause to this court. In 324 Ill., page 40, is the opinion so holding, which recites the pleadings and orders entered in the case. It is unnecessary to repeat these here.

Plaintiff in error asserts the right of review of the foreclosure decree on the ground that the record shows that he was a necessary party in interest who was not made a party defendant by complainant's bill. This assertion of interest is based upon an amended cross-bill filed by George W. O'Neil, which among other things alleged that the premises in question were on June 11, 1921,

E. L. VERTS, Complainant,	
vs.	
WILLIAM A. BURNS et al., Defendants.	
GERALD B. O'NEAL, Plaintiff in Error,	MEMORANDUM OF DISTRICT COURT OF [illegible]
vs.	
HENRY T. GERRY et al., Defendants in Error.	

No. 9441A.635

IN PROHIBITION SUPREME DEPARTMENT

DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, Gerald B. O'Neal, seeks to reverse a preliminary decree, the order of the Circuit court refusing to allow him to file a petition for a bill of review, and also the order issuing a writ of prohibition (if the petition should be filed) in favor of Henry T. Gerry.

The writ of error was originally sued out of the Supreme court, which held that, as a freehold was not involved, it had no jurisdiction and transferred the cause to this court. In 134 Ill., page 40, in the opinion so holding, which contains the pleadings and orders entered in the case. It is unnecessary to repeat those here.

Plaintiff in error asserts the right of review of the foreclosure decree on the ground that the record shows that he was a necessary party in interest who was not made a party defendant by complainant's bill. This assertion of interest is based upon an amended cross-bill filed by George W. O'Neal, which among other things alleged that the premises in question were on June 11, 1883,

which was five days before the filing of complainant's bill, conveyed to Gerald D. O'Neil, then a minor, and others. No answer to this amended cross-bill is in the record. It appears that subsequently evidence was heard in support of and in opposition to it, and it was dismissed for want of equity. No evidence is in the record. We must therefore assume that it was not proven that Gerald D. O'Neil had any interest in the premises.

Even if plaintiff in error was a proper party to the foreclosure and not made a party, he cannot complain of a decree which does not affect whatever interest he may have in the premises. The decree is valid as to the parties to the suit. Pope v. North, 33 Ill. 441; Walker v. Warner, 179 Ill. 16; Clark v. Zaleski, 268 Ill. 427; People v. Evans, 262 Ill. 235.

A final reason adverse to plaintiff's maintenance of this writ of error is that it was sued out three years, two months and some days after the decree was entered, which is well past the statutory limitation of two years. Practice Act, chpater 110, section 117, Illinois Statutes.

We cannot review the action of the court in denying plaintiff's motion for leave to file a bill of review, for the contents of neither the motion nor the petition are disclosed by the record.

After hearing the court found that George W. O'Neil and Gerald D. O'Neil, "parties defendant to said suit or parties who have come into possession of said premises pending said suit, or under or through the parties thereto, were in possession of said premises" and refused to surrender the same, and ordered the writ of assistance to issue. As George W. O'Neil was a party to the foreclosure proceeding, we must assume that the court found that Gerald D. O'Neil was a party who had come into possession of the premises pending the suit, or under or through the parties thereto. There

is nothing in the record which contradicts this. It does not avail to say that this is contradicted by the allegations of George O'Neil's amended cross-bill which was dismissed.

Plaintiff in error presents no substantial reason for reversing the decree and orders of the Circuit court, and they are affirmed.

AFFIRMED.

Hatchett and Johnston, JJ., concur.

45 - 31157

CHICAGO TITLE & TRUST COMPANY,
Appellee,

vs.

WILMA J. HYNES et al.
On Appeal of MRS. FANNIE BURTON
et al.,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

244 I.A. 636

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a petition filed by the Chicago Title and Trust Company, trustee under the will of William J. Hynes, deceased, to have the will construed.

The will consists of 17 clauses. There is no dispute in regard to the provisions in the first ten clauses. The first clause directs that the debts and funeral expenses be paid. The second, third, fourth, fifth, sixth, seventh, eighth and ninth provide for the payment of specific bequests, all of which have been paid. The tenth consists of a bequest to the wife of the testator. There is no dispute as to this clause, but certain language in the clause is discussed by counsel in connection with the clauses in controversy. The actual controversy concerns only the eleventh, twelfth, thirteenth, fourteenth and sixteenth clauses. The pertinent parts of the will are as follows:

"Tenth: After the payment of the foregoing specific legacies, I give, devise and bequeath all the rest and residue of my property, real, personal, and mixed, of every kind and nature, to my wife, Jennie E. Hynes, for the period of her natural life, for her sole use and benefit during her life.

"Eleventh: After the death of my said wife, it is my will that the lots and cottage I now own at No. 289 Aldebaran Canal, Venice, California, and the rents and profits thereof, shall become the property of my adopted daughter, Wilma J. Hynes, for her use and benefit until she is thirty (30) years of age, and if she shall live until that age then the same shall vest in her forever; and if she shall die, without issue, before attaining that age, then said property above designated shall then become a part of my residuary estate.

"Twelfth: After the death of my said wife, it is my will that Sixty Thousand ($60,000.00) Dollars, of or from said estate shall

be set aside for my adopted daughter, Wilma J. Hynes, to be held in Trust for her use and benefit until she is Thirty (30) years of age, and if she shall live until that age, then to be paid over to her; and if she shall die before that age, said Sixty Thousand ($60,000.00) Dollars shall then become a part of my residuary estate; and I hereby appoint the Roman Catholic Bishop, residing at Los Angeles, California, Guardian and Trustee of the person and estate of the said Wilma J. Hynes, and will and direct that the said Wilma J. Hynes shall receive, after the death of my said wife, from said Guardian and Trustee, the income from said Sixty Thousand ($60,000.00) Dollars, until she attains the age of Thirty (30) years, when the whole of said trust fund of Sixty Thousand ($60,000.00) Dollars, shall be paid over to her as aforesaid.

"In consideration for the assumption of the said trust and the performance of the said services as Guardian and Trustee by the said Roman Catholic Bishop residing in Los Angeles, California, Ten Thousand ($10,000.00) Dollars shall be set aside from my said estate upon the death of my said wife, the income of which sum shall go to the said Roman Catholic Bishop until the death of said Wilma J. Hynes, if she should die before the age of Thirty (30) years, or until the payment to her of said Sixty Thousand ($60,000.00) Dollars at the age of Thirty (30) years, if she shall live to that age, and after the termination of said Guardianship and Trusteeship, either by the death or by attainment of the age of Thirty (30) years of said Wilma J. Hynes, then the sum of Ten Thousand ($10,000.00) Dollars shall become the property of said Roman Catholic Bishop of Los Angeles, California, and absolutely vest in him as his own.

"Thirteenth: I further will and bequeath that after the death of my said wife, Ten Thousand ($10,000.00) Dollars shall be set aside from my said estate, the income from which sum shall be paid to my adopted son, Harry Hynes, of Chicago, Illinois, in monthly or quarterly payments, in such manner as my Executor shall deem best, during the period of his natural life, and upon his death said sum of Ten Thousand ($10,000.00) Dollars shall become a part of my residuary estate; said income from said sum shall not be assignable, in whole or in part, by said Harry Hynes.

"Fourteenth: After the death of my said wife, it is my will that the income from my said estate left for life to my said wife, remaining after the provisions of Sections Twelfth and Thirteenth of this instrument are complied with and satisfied, shall be divided as follows:

"'A' One-sixth (1/6) of the residue of said income shall go to Katherine and Laura Cottrell, children of my wife's deceased sister, Mrs. Mary Cottrell, share and share alike, during their natural life.

"'B' One-sixth (1/6) of the residue of said income shall go to Mrs. Annie Webster, of Los Angeles, California, my wife's sister, during her natural life.

"'C' One-sixth (1/6) of the residue of said income shall go to my wife's sister, Mrs. Fannie Burton of Chicago, Illinois, during her natural life, and after her death to her husband, and to her children, or the survivors or survivor of them, during their natural lives or life.

"'D' One-sixth (1/6) of the residue of said income shall go to my wife's sister, Mrs. Georgie B. Evans of Los Angeles, California, during her natural life.

"'E' One-sixth (1/6) of the residue of said income shall go to my niece, Mrs. Minnie Harvey, of Norwich, Connecticut, to be held in Trust, however, by my Executor, hereinafter named, and which income shall be paid to her at the rate of Fifty ($50.00)

be not made for my adopted daughter, William T. Tyson, to be held in Trust for her use and benefit until she is thirty (30) years of age, and if she shall live until that age, then to be held over to her; and if she shall die before that age, said Thirty Thousand ($30,000.00) Dollars shall then become a part of my residuary estate; and I hereby appoint the Human Institute Bldgs., Trustee of the Angelos, California, Foundation and Trustee of the person and estate of the said William T. Tyson, and I hereby direct that the said William T. Tyson shall receive, after the death of my said wife, Tyson said Guardian and Trustee, the income from said Sixty Thousand ($60,000.00) Dollars, until she attains the age of Thirty (30) years, when the whole of said first half of Sixty Thousand ($30,000.00) Dollars, shall be paid over to her as aforesaid.

"In consideration for the assumption of the said trust and the performance of the said services as Guardian and Trustee by the said Human Institute Bldgs. providing in Los Angeles, California, the Thousand ($10,000.00) Dollars shall be set aside from my said estate upon the death of my said wife, the income of which shall go to the said Human Institute Bldgs. until the death of said William T. Tyson, if she should die before she age of Thirty (30) years, or until the payment to her of said Sixty Thousand ($60,000.00) Dollars at the age of Thirty (30) years, if she shall live to that age, and after the termination of said guardianship and Trusteeship, either by the death or by attainment of the age of Thirty (30) years of said William T. Tyson, then the sum of Ten Thousand ($10,000.00) Dollars shall become the property of said Human Institute Bldgs. of Los Angeles, California, and absolutely vest in him as his own.

"Statement: I further will and bequeath that after the death of my said wife, Ten Thousand ($10,000.00) Dollars shall be set aside from my said estate, the income from which sum shall be paid to my adopted son, Harry Tyson, or his heirs, Elizabeth, in consideration of gratuitously payment, in such manner as my Executor shall deem best, during the period of his natural life, and upon his death said sum of Ten Thousand ($10,000.00) Dollars shall become a part of my residuary estate; said income from said sum shall be contingent, in whole or in part, by said Harry Tyson.

"Contingent: After the death of my said wife, to my said Harry Tyson, in consideration of gratuitously payment, in such manner as my Executor shall deem best, during the period of his natural life, and upon his death said sum of Ten Thousand ($10,000.00) Dollars shall become a part of my residuary estate; said income from said sum shall be contingent, in whole or in part, by said Harry Tyson.

"Contingent: After the death of my said wife, to my said Harry Tyson, in consideration of gratuitously payment, in such manner as my Executor shall deem best, during the period of his natural life, and upon his death said sum of Ten Thousand ($10,000.00) Dollars shall become a part of my residuary estate; said income from said sum shall be contingent, in whole or in part, by said Harry Tyson.

"Contingent: After the death of my said wife, to my wife's sister, Mrs. Harry Cotton, shall receive and enjoy, during her natural life.

"V. Contingent (1/6) of the residue of said income shall go to Mrs. Maude Webster, of Los Angeles, California, by wife's sister, during her natural life.

"V. Contingent (1/6) of the residue of said income shall go to my wife's sister, Mrs. Pamela Lawson of Chicago, Illinois, during her natural life, and after her death to her husband, and to her children, or the surviving or survivor of them, during their natural lives or life.

"V. Contingent (1/6) of the residue of said income shall go to my wife's sister, Mrs. Cornelia H. Evans of Los Angeles, California, during her natural life.

"V. Contingent (1/6) of the residue of said income shall go to my niece, Mrs. Alice Harvey, of Bowie, Maryland, Contingent, to be held in Trust, however, by my Executor, Contingent, and not of latter shall be paid to her or the wife of Mrs. (50.00)

Dollars per month during her natural life.

"In the event that said income exceeds said monthly allowance above provided, it is my will that such accumulations, at the death of said Mrs. Minnie Harvey, shall become a part of my residuary estate.

"'F' One-sixth (1/6) of the residue of said income shall go to my niece, Mrs. Addie Smith, during her natural life.

"It is my will that distribution of the income to the parties provided for in this Section Fourteenth shall be made quarterly, if practicable, except as otherwise stated. ***

"Sixteenth: I will and direct that after the death of my wife, and of the legatees, who are designated herein to receive the income of my said estate after the death of my said wife, during their natural lives respectively, all of my estate, and all of my residuary estate shall, as the same shall accrue by the death of any of the parties mentioned above, go to the Catholic Bishop of Chicago, a corporation, sole, as Trustee, to be paid over by him, share and share alike, to the Saint Mary's Training School at Feehanville, Illinois, and to the Catholic Church Extension Society of the United States of America, a corporation, organized under the laws of the State of Michigan, and to the Visitation and Aid Society of Chicago, Illinois, or to the survivors or survivor or successors or successor of said institutions or institution."

The Chancellor found, and it is not disputed by any of the parties, that the phrase "one-sixth (1/6) of the residue of said income," used in the lettered paragraphs A, B, C, D, E and F of clause Fourteenth, should read "one-sixth (1/6) of the income of said residue."

William J. Hynes died on May 7, 1914. After his death the following legatees under the will died: Jennie M. Hynes, Harry Hynes, Annie Webster, Robert A. Burton and Georgie B. Evans. The petition alleges "that by reason of these facts, doubts and differences have arisen and exist between some of the beneficiaries under the will, and between some of the beneficiaries and your orator, with reference to the true and proper construction and interpretation, intent and meaning of the will."

The pertinent parts of the decree of the Chancellor are as follows:

"(a) That the fund of ten thousand dollars ($10,000.00) held by the trustee under the thirteenth clause of the will for the benefit of Harry Hynes, should at once be paid over to the Catholic Bishop of Chicago, as residuary legatee under the sixteenth clause of the will, together with all the income accumulated thereon from November 21, 1921, the date of the death of Harry Hynes;

"(b) In the event of the death of Wilma J. Hite (formerly Wilma J. Hynes) before reaching the age of thirty years, the fund of sixty thousand dollars ($60,000.00) provided under the twelfth clause of said will, will then become payable at once to the Catholic Bishop of Chicago as residuary legatee;

"(c) That the fund of ten thousand dollars ($10,000.00) given to the Roman Catholic Bishop residing in Los Angeles, California, under the twelfth clause of the said will, will be payable to him upon the termination of the trust which was created for the benefit of the said Wilma J. Hite (formerly Wilma J. Hynes) under the said clause.

"(d) That upon the death of Mrs. Annie Webster, beneficiary under paragraph 'B,' one of the said six lettered paragraphs of the said fourteenth clause, one-sixth of the principal of the fund under the said fourteenth clause became payable to the Catholic Bishop of Chicago as residuary legatee; and similarly upon the death of Mrs. Georgie E. Evans, beneficiary under paragraph 'D', another of the said six lettered paragraphs of the said fourteenth clause; and so upon the death or deaths of the beneficiary or beneficiaries named in any one or more of the other said lettered paragraphs of the said fourteenth clause;

"(e) That inasmuch as, upon the deaths of the beneficiaries named in any of the lettered paragraphs of the fourteenth clause of the said will, aliquot parts are set off to the residuary legatee from the principal of the fund in the hands of the trustee, described in the fourteenth clause of the said will as 'my said estate left for life to my said wife, remaining after the provisions of Sections Twelfth and Thirteenth of this instrument are complied with and satisfied,' the share described in each of the six lettered paragraphs of the said clause as 'one-sixth (1/6) of the residue of said income' (meaning thereby 'one-sixth of the income of the said residue') became one-fifth of the income of the part of the said fund remaining after the setting aside of one-sixth of the said fund upon the death of Mrs. Annie Webster, one-fourth of the income of the part of the said fund remaining left after the setting aside of a like proportionate share of the said fund upon the death of Mrs. Georgie E. Evans; and so upon the death or deaths of the beneficiary or beneficiaries named in any one or more of the other said lettered paragraphs of the said fourteenth clause."

It is obvious that all of the residue of the estate ultimately will go to the Catholic Bishop of Chicago. The only questions, broadly stated, are whether he should receive it in parts at different times, depending on certain contingencies; or whether he should receive it as an entirety at one time.

Counsel for the defendants Katherine Cottrell, Laura Cottrell, and other defendants, contends that the proper construction of the will is as follows:

"(1) That *** the fund of Ten Thousand Dollars ($10,000) held by the Trustee under the thirteenth clause of the will for the benefit of Harry Hynes upon the death of the latter should

have fallen into and become part of the trust fund created by the fourteenth clause of the will, or should be held by the Executor as Trustee to be administered by him in accordance with the terms of the fourteenth clause of the will.

"(2) That ** in the event of the death of Wilma J. Hite (formerly Wilma J. Hynes) before reaching the age of thirty (30) years, the fund of Sixty Thousand Dollars ($60,000) provided under Section Twelfth of the will shall fall into and become a part of the trust fund created by the fourteenth clause of the said will, or that the said fund of Sixty Thousand Dollars ($60,000) should be held by the executor as trustee to be administered by it under and in accordance with the provisions of Section Fourteenth of the will.

"(3) That ** at the death of Mrs. Annie Webster, beneficiary under paragraph 'B,' one of the six lettered paragraphs of Section Fourteenth of the will, the one-sixth portion of the principal of the fund, the income from which had been payable to Mrs. Annie Webster during her lifetime, should remain as principal of the fund under Section Fourteenth and the income therefrom should be payable in accordance with the terms and provisions of said Section Fourteenth.

"(4) And, similarly, that upon the death of Mrs. Georgie B. Evans, beneficiary under paragraph 'D,' one of the six lettered paragraphs under Section Fourteenth, the one-sixth portion of the principal of the fund should remain as principal of the fund under said Section Fourteenth and the income therefrom should be payable under and in accordance with the terms and provisions of said Section Fourteenth.

"(5) And so, also, upon the death or deaths of the beneficiary or beneficiaries named in any one or more of the other said lettered paragraphs of Section Fourteenth until the death of the last survivor of the said beneficiaries named in Section Fourteenth, at which time the entire principal of the fund under Section Fourteenth should become payable to The Catholic Bishop of Chicago as residuary legatee."

We do not agree with the method of reasoning pursued by counsel in reaching his conclusions. We shall not state in detail all of the arguments of counsel. We shall endeavor merely to outline the substance of his contentions.

He contends that since the testator, after providing for the bequest to his wife in the Tenth clause, uses the phrase "a part of my residuary estate" in subsequent clauses, the use of that phrase "presupposes and involves the idea that there was or should be in existence a residuary estate under the terms" of the will "before the death of either Wilma J. Hynes or Harry Hynes;" that the use of the word "part" implies the existence of "the 'something' of which a thing is to become a part;" that such a

residuary estate is provided for and defined in clause Tenth in the language, "All the rest and residue of my property;" that this is the first definition of the phrase "residuary estate;" that the "next definition of a residuary estate" is found in clause fourteenth in the following language, "after the death of my wife it is my will that the income from my estate left for life to my said wife remaining after **"; that from these premises it follows that when Harry Hynes died his bequest of $10,000 passed to the residuary estate defined in clause fourteenth, became part of that residuary estate, and did not go immediately to the Catholic Bishop; that if Wilma J. Hynes dies before the age of thirty years, her bequest of $60,000 will pass to the residuary estate defined in clause fourteenth, will become part of that residuary estate, and will not go immediately to the Catholic Bishop; that the residuary estate of clause fourteenth, which by the provisions of clause sixteenth, ultimately is to go to the Catholic Bishop, will not go to the Catholic Bishop until the death of all of the legatees mentioned in the lettered paragraphs A, B, C, D, E and F of clause fourteenth.

In our opinion the arguments of counsel are not convincing. Assuming for the sake of argument that counsel's premise, which presupposes that the phrase "residuary estate" was expressly defined by the testator, is correct, and waiving the tautology that as a consequence would result in the use of the two phrases, "all of my estate" and "all of my residuary estate" in the sixteenth clause, it becomes necessary to explain why the word "any" is used in clause sixteenth in connection with the phrase "any of the above mentioned." The explanation of counsel is that it may be treated as tautology, or else may be changed to the word "all" to make the will "conform to the manifest intent that all of the residuary estate should pass to the Catholic Bishop at one and the same time." We think

that the word "any" is not used tautologically; we also think that it would not be permissible to change it to "all," as, in our view, it is not necessary to resort to the rule of construction contended for by counsel that the language of a will may be changed in order to effectuate the clear intent of the testator.

Further in support of his contention that it was the intent of the testator that the residuary estate should not pass to the Catholic Bishop until after the death of all of the legatees mentioned in the lettered paragraphs A, B, C, D, E and F of clause fourteenth, counsel for the defendants Katherine Cottrell, Laura Cottrell, and other defendants, maintains that clause fourteenth does not state where the income shall go upon the death of any of the legatees; that clause fourteenth does not state where "the corpus of a one-sixth of the residuary estate shall go upon the death of any" of the legatees; that clause fourteenth "treats the residuary estate as an entirety and provides simply that the 'income,' i. e. the <u>whole</u> income from the <u>whole</u> residuary estate, shall be divided among the beneficiaries named in section fourteenth." In our opinion, even though clause fourteenth may be silent in the respects mentioned, when the clause is considered in connection with clause sixteenth, the construction placed on clause fourteenth by the Chancellor is correct.

Counsel for Katherine Cottrell, Laura Cottrell and other defendants further contends that "upon a proper construction of section fourteenth ** the gift is clearly to a class and not to individual beneficiaries; and the the rule is that "where the gift is to a class then upon the death of any member of the class, either before or after the death of the testator, his beneficial interest passes equally to the survivors of the class."

We clearly are of the opinion that the testator did not intend that the legatees under clause fourteenth should take as a

class. A gift to a class has generally been defined as a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or some other definite portions, the share of each being dependent for its amount upon the ultimate number. 40 Cyclopedia of Law and Procedure, p. 1473; The Volunteers of America v. Pierce, 267 Ill. 406, 414. In the case of the Volunteers of America v. Pierce, supra, the court quoted with approval the following language (pp. 414, 415):

> "Whether a devise or bequest is to a class or to the individuals constituting the class distributively, depends upon the language of the will. If from such language it appears that the number of persons who are to take and the amount of their shares are uncertain until the devise or bequest takes effect, the beneficiaries will generally be held to take as a class; but where at the time of making the gift the number of beneficiaries is certain, and the share each is to receive is also certain and in no way dependent for its amount upon the number who shall survive, it is not a gift to a class but to the individuals distributively; and this is generally held to be the case where the beneficiaries are named and their shares are certain."

We think that in the case at bar the legacies provided for in clause fourteenth were not intended as gifts to a class but to individuals. The number of beneficiaries is certain, and the share each is to receive also is certain and in no way dependent upon the number of beneficiaries who shall survive. Furthermore, since the provisions in the lettered paragraph "C" of clause fourteenth relating to the gift to Mrs. Fannie Burton and the provisions relating to the gift to Mrs. Minnie Harvey in the lettered paragraph "E" are different from each other and also from the gifts to the legatees in the other lettered paragraphs, it clearly appears that all of the gifts provided for in clause fourteenth were intended as gifts to individuals and not to a class.

Counsel for the trustee, the Chicago Title & Trust Company, agree with the Chancellor's construction of the will in

[illegible] class. A gift to a class has commonly been defined as a gift of property made to a body of persons ascertainable in number as the class of the gift, to be ascertained at a future time, who are all to take in equal or some other definite portions, the share of each being dependent for its amount upon the ultimate number. [illegible] Lyderskis of Law and Precedents, p. 1479; [illegible] v. Flynn, 247 Ill. 408, etc. In the case of the Vatsonville of [illegible] v. Flynn, supra, the court quoted with approval the following language (p. 414):

> "Whether a devise or bequest is to a class or to the individuals constituting the class distributively, depends upon the language of the will. If from such language it appears that the number of persons who are to take and the amount of their shares are uncertain until the death or bequest takes effect, the beneficiaries will generally be held to take as a class; but where at the time of making the gift the number of beneficiaries is certain, and the shares such as to vesting is also certain and in no way dependent for its amount upon the number who shall survive, it is not a gift to a class but to the individuals distributively and their vesting will be in the case where the beneficiaries are named and their shares are certain."

We think that in the case at bar the language provided for in Clause Fourteen were not intended as gifts to a class but to individuals. The number of beneficiaries is certain, and the share each is to receive also is certain and in no way dependent upon the number of beneficiaries who shall survive. Furthermore, since the provisions in the lettered paragraph "C" of Clause Fourteen relating to the gift to Mrs. Frank Burns and the provisions relating to the gift to Mrs. Claude Harvey in the lettered paragraph "E" are different from each other and also from the gifts to the legatees in the other lettered paragraphs, it clearly appears that all of the gifts provided for in Clause Fourteen were intended as gifts to individuals and not to a class.

Counsel for the Probate, the Chicago Title & Trust Company, agree with the Commissioner's construction of the will. In

all respects except as to the Chancellor's construction of clause fourteenth in connection with clause sixteenth. Counsel for the trustee, the Chicago Title & Trust Company, and counsel for the defendants Katherine Cottrell, Laura Cottrell and other defendants, agree in their construction of clause fourteenth, but differ as to their construction of the other parts of the will in controversy. And while they agree as to their conclusions regarding the construction of clause fourteenth, they disagree in respect of the reasons for their conclusions.

According to the construction of counsel for the trustee, the Chicago Title & Trust Company, clause sixteenth, if expressed explicitly, would read as follows: "I will and direct that after the death of Katherine and Laura Cottrell, Mrs. Fannie Burton, and all the other annuitants, all of my estate (and all of my residuary estate, as the same shall accrue by the death of Wilma or Harry Hynes or Mrs. Harvey) shall go to the Catholic Bishop of Chicago *** as trustee **". On this theory counsel contend that the phrase "one-sixth" used in each of the lettered paragraphs A, B, C, D, E and F of clause fourteenth, would be equivalent to the phrase "an equal share;" and that in order to conform to such construction the phrase "one-sixth" in each of the lettered paragraphs of clause fourteenth should read, "one share, being one-sixth."

We admit that the construction of clause fourteenth in connection with clause sixteenth presents some difficulties. The question is not free from doubt. It is true, as counsel for the trustee, the Chicago Title & Trust Company, maintain, that it is clear that the testator never intended that the Catholic Bishop of Chicago, the ultimate legatee, should receive any of the income from the estate; and that the testator did not authorize either by "positive direction" nor by "the slightest affirmative permission," the trustee "to separate one-sixth of the principal of the estate

[illegible] research except as to the Commissioner's construction of clause fourteenth in connection with clause sixteenth. Counsel for the [illegible]ructor, the Chicago Title & Trust Company, and counsel for the [illegible]defendants Mathurine Gottfried, Laura Gottfried and other defendants, agree in their construction of clause fourteenth, but differ as to their construction of the other parts of the will in controversy. [illegible]ed while they agree as to their conclusions regarding the construction of clause fourteenth, they disagree in respect of the reasons for their conclusions.

According to the construction of counsel for the [illegible]ructor, the Chicago Title & Trust Company, clause sixteenth, if expressed explicitly, would read as follows: "I will and direct that after the death of Mathurine and Laura Gottfried, Mrs. Fannie [illegible]ston, and all the other annuitants, all of my estate (and all of my residuary estate, as the case shall accrue by the death of Fannie [illegible] Hairy Ryan or Mrs. Harvey) shall go to the CHARITABLE MEANING OF [illegible]ldings *** as trustee ***". In this theory counsel contend that the phrase "one-sixth" used in each of the lettered paragraphs A, [illegible], C, D, E and F of clause fourteenth, would be equivalent to the phrase "an equal share;" and that in order to conform to such construction the phrase "one-sixth" in each of the lettered paragraphs of clause fourteenth should read, "one share, being one-sixth."

We admit that the construction of clause fourteenth [illegible] connection with clause sixteenth presents some difficulties. [illegible] the question is not free from doubt. It is true, as counsel for the trustee, the Chicago Title & Trust Company, maintain, that it [illegible] clear that the testator never intended that the Catholic Bishop [illegible] Chicago, the ultimate legatee, should receive any of the income [illegible]rom the estate; and that the testator did not authorize either by [illegible]ositive direction" nor by "the slightest affirmative possibility," [illegible] trustee "to operate one-sixth of the principal of the estate

from the total and turn it over to the ultimate legatee." We do not think, however, that these contentions render the Chancellor's construction of the clauses in question unwarrantable. The decree of the Chancellor does not direct that any of the income of the estate should be paid to the Catholic Bishop of Chicago, the ultimate legatee, but does find that upon the death of Mrs. Annie Webster, one of the legatees, one-sixth of the principal fund became payable to the Catholic Bishop of Chicago; that similarly, upon the death of Mrs. Georgie E. Evans, another legatee under clause fourteenth, one-sixth of the principal fund became payable to the Catholic Bishop; and that a similar construction should apply upon the deaths of the other legatees under clause fourteenth. Although there is no explicit authority under the will for such construction, we think that this construction carries out the intent of the testator.

In regard to the contention of counsel for the trustee, the Chicago Title & Trust Company, that the phrase "one-sixth of the income" used in the lettered paragraphs of clause fourteenth, should be changed to read, "One share, being one-sixth," we are of the opinion that it is not necessary so to change the reading of the phrase to effectuate the intention of the testator.

We are of the opinion that the construction of the will by the Chancellor is correct. It is the rule that while the object of the construction of a will is to ascertain the intention of the testator, the intention must be one that is expressed in the will and must be determined from the language used in the will. Rodisch v. Moore, 257 Ill. 615, 622. It is also the rule that a will cannot be reformed to conform to an intention not expressed in the will. Rodisch v. Moore, supra, (p. 623.) In the case at bar we think the intention of the testator may be ascertained without changing any of the language of the will. We think that it clearly appears from the will that the testator

under the will

intended that the legacies given to Wilma J. Hynes, Harry Hynes and Mrs. Minnie Harvey, should upon their deaths become payable immediately to the Catholic Bishop of Chicago. In our view it is evident that the testator intended that what he termed the "residuary estate" should be a different, distinct estate from the corpus or principal estate. He uses the phrase "residuary estate" five times in the will. In clause sixteenth it follows the phrase, "all of my estate;" and if the testator did not intend it to have a different meaning from the phrase, "all of my estate," it would have to be treated as tautology or surplusage. The rule, as stated by Jarman, is that "where a testator uses an additional word or phrase, he must be presumed to have an additional meaning." Jarman on Wills, vol. II, p. 2211 (6th English Ed. 1910).

In our opinion the use of the word "part" in connection with the phrase "shall become a part of my residuary estate" does not imply that the testator in a previous provision of the will had created a residuary estate to which the part should be added. We think that in using the phrase "shall become a part of my residuary estate" the testator merely had in mind a possible estate, or, as counsel for the trustee, the Chicago Title & Trust Company, aptly term it, "a casual residue" which might come into existence. The use of the word "become" supports the view that the testator had in mind, not a residuary estate that he had previously defined, but a possible future estate or possibly future "casual residue."

Clause fourteenth, as we have said, presents a more difficult question of construction. Counsel for the trustee, the Chicago Title & Trust Company, have argued the question with a great deal of force. We do not deny that clause fourteenth is susceptible reasonably of the construction contended for by

counsel. We think, however, that the construction adopted by the Chancellor is the one that more probably expresses the actual intent of the testator. In our view, the phrase "as the same shall accrue," used in clause sixteenth, does not qualify only the phrase "residuary estate," as counsel for the trustee, the Chicago Title & Trust Company, contend, but qualifies that phrase and also the phrase "all of my estate." We think that the word "any" as used in the phrase "any of the parties mentioned above," does not mean "all" of the parties; and we also think that the phrase "any of the parties mentioned" is not intended to refer only to Wilma J. Hynes, Harry Hynes and Mrs. Minnie Harvey, as counsel for the trustee, the Chicago Title & Trust Company, contend, but refers to all of the legatees mentioned in the entire will.

For the reasons stated the decree of the Chancellor is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

comment. We think, however, that the construction adopted by the Commission is the one that most probably expresses the actual intent of the testator. In our view, the phrase "as the same shall accrue," used in clause nineteen, does not qualify only the phrase "residuary estate," as counsel for the trustee, the Salem Title & Trust Company, contend, but qualifies that phrase and also the phrase "all of my estate." We think that the word "any" as used in the phrase "any of the partles mentioned above," does not mean "all" of the parties; and we also think that the phrase "any of the parties mentioned" is not intended to refer only to Miles J. Ryan, Harry Shaw and Jos. Ziegler Harvey, as counsel for the trustee, in Salem Title & Trust Company, contend, but refers to all of the legatees mentioned in the entire will.

For the reasons stated the decree of the Commission is affirmed.

AFFIRMED.

Andrews, P. J., and Hatchard, J., concur.

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LENA KLATZ, Defendant in Error, vs. JOSEPH PFEIFFER, Plaintiff in Error.	ERROR TO SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by Lena Klatz, the plaintiff, to recover damages from Joseph Pfeiffer, the defendant, for injuries sustained as the result of having been attacked and bitten by a dog owned by and kept on the premises of the defendant.

The case was tried before the court and a jury. The jury found the defendant guilty and assessed the plaintiff's damages at the sum of $4200. From the judgment on the verdict the defendant has prosecuted the present appeal.

On the material issues of fact the evidence is conflicting. Briefly stated the undisputed evidence is as follows:

The plaintiff and the defendant had cottages about two blocks away from each other at a summer resort in the state of Michigan. Defendant's cottage was situated on a lot about 100 feet square. A veranda about 8 feet wide extended across the entire front of the defendant's cottage. The premises of the defendant were enclosed by a woven wire fence about 4 feet high, and there was "barbed wire stretched above the four feet, eight inches above the top of the fence." There was an iron gate immediately in front of the house of closely woven wire, and there was a double latch on the gate. The distance from the gate to the veranda was

about 4½ to 5 feet. There was a cement walk from the veranda to the gate. The veranda was entirely screened in and there was a screen door at the steps leading off of the veranda, and also a screen door leading from the veranda into the living room of the cottage. Both of the doors were kept closed by springs, and the outer door also had a clamp to keep it shut. Immediately back of the living room was the kitchen and just off of the kitchen was a bedroom. The defendant kept two bulldogs on the premises, a female and her son. The female was an old dog which the defendant had kept for a long time. The son was born in 1920. The dogs were kept for the protection of the defendant's wife, who was alone a great deal of the time in the cottage. On June 22, 1923, about nine o'clock in the morning, the plaintiff went to the cottage of the defendant carrying a bowl of eggs which she intended to give to the defendant, and the younger dog attacked and bit the plaintiff. The plaintiff had been to the cottage of the defendant before and had met the defendant's wife, who had shown her around the house.

The principal facts in dispute are (1) whether the plaintiff knew that the dog that bit her was kept on the premises of the defendant; (2) whether the plaintiff was attacked and bitten by the dog just outside the gate of the premises or at the entrance of the door leading from the veranda to the living room; (3) whether the defendant knew that the dog had a vicious disposition; (4) whether the injuries of the plaintiff are as serious as alleged by the plaintiff.

On the question whether the plaintiff knew that the dog bit her was kept on the premises of the defendant, the plaintiff testified that she knew that the defendant had two dogs, but that she saw only one dog, "a quiet, gentle dog," in the defendant's cottage at the time that she was shown around the house by

the defendant's wife; that she had never seen the dog that bit her before the day that he bit her. The defendant testified that at the time that she showed the plaintiff around the house the plaintiff saw both dogs.

On the question as to where the plaintiff was when the dog attacked and bit her, the plaintiff testified that she was outside of the gate; that she had not opened the gate; that when she had reached the gate the defendant's wife was not on the veranda, and that she, the plaintiff, "hollered for her;" that she "hollered" again; that the defendant's wife did not hear her, but that the dog did and came out by the screen door; that there "was one jump on the door, on the fence, on my neck."

The defendant's wife testified that on the morning in question she was scrubbing the rear bedroom next to the kitchen; that the young dog was in the house with her, lying on the kitchen floor between the living room and the bedroom; that she "had just been playing with the young dog with the wet mop rag;" that she did not know that the plaintiff was on the premises until she heard the plaintiff open the door to the veranda and then open the screen door leading to the living room; that she thought at first that it was her husband, but that just at that moment the plaintiff screamed and dropped the bowl of eggs which she was carrying onto the floor of the living room, where they broke and splashed against some of the furniture and the wall of the room; that she saw the plaintiff back out of the room across the veranda and onto the veranda steps, where she fell; that the dog had held of the plaintiff's arm and the plaintiff was kicking the dog; that she, the witness, was just recovering from a nervous breakdown, and fainted for a moment; that she quickly recovered, seized the dog and took him around to the back of the house; that shortly after

the occurrence, while plaintiff was lying on a couch on the veranda, the plaintiff said to the witness, "I don't blame you or the dog. I had no right to walk in the house without calling."

Henry C. March, a witness on behalf of the defendant, testified that he went to the cottage about a half an hour after the occurrence and helped to clean up the broken eggs; that the eggs were about two feet on the inside of the door of the house.

Mrs. George Zimmerman testified on behalf of the defendant that she was at the cottage a few minutes after the occurrence; that there were freshly broken eggs on the veranda, on the floor of the living room, and up against the wall of the living room close to the door; that she heard the plaintiff say, "I walked in. It was my fault."

Four witnesses on behalf of the defendant testified that they had heard the plaintiff speak of the occurrence, and that the plaintiff had said that the dog attacked her when she walked into the living room.

On the issue whether the defendant knew that the dog had a vicious disposition, Mrs. Scott Hyde, a witness on behalf of the plaintiff, testified that in the summer of 1921 she was bitten by the dog while she was in the yard of the defendant; that the dog came from the direction of the back porch or rear of the cottage; that he lunged at her, tore through her clothing, bit her on her thigh, and planted his teeth on her arm; that "the bite" was not deep; that she screamed and that both the defendant and his wife came to her, expressed regret, and defendant's wife bandaged her wounds.

Howard Martin, a boy of 11 years of age, testified that in June, 1922, while he was going through the yard of the defendant he saw the dog and started to run; that the dog jumped on his back, knocked him down and scratched his face with his paw; that he

thinks the defendant chased the dog away.

It is contended by counsel for the defendant that the date of this occurrence was not in 1922, but in 1921.

The defendant offered to show by ten witnesses that the dog did not have a vicious disposition, but that he was a gentle, playful dog.

In regard to the issue of fact concerning the injuries sustained by the plaintiff, we do not think that it is necessary to state the evidence. We need only to say that in our opinion, according to the preponderance of the evidence, the injuries are not sufficient to justify the amount of damages awarded by the jury.

Counsel for the defendant maintain that the verdict of the jury finding the defendant guilty of negligence is manifestly against the weight of the evidence; that the verdict indicates passion and prejudice. The preponderance of the evidence, according to counsel for the defendant, clearly shows that the plaintiff entered the living room of the defendant's cottate unannounced; that in so doing she failed to exercise the care and caution of an ordinarily prudent person; and that her negligence was the proximate cause of the attack by the dog.

Assuming for the sake of argument that the attack occurred at the place and in the manner contended for by counsel for the defendant, in order to justify the conclusion that the plaintiff was guilty of contributory negligence, the preponderance of the evidence must show that the plaintiff knew, or at least had reason to believe, that the dog was a vicious dog with a propensity to bite strangers. Chicago & Alton R. R. Co. v. Kickkuck, 197 Ill. 304, 309. In our view the preponderance of the evidence does not so show.

Furthermore, we do not think that we would be warranted in holding that a finding by the jury that the attack occurred at the place and in the manner testified to by plaintiff would be mani-

festly against the weight of the evidence. There is a direct conflict in the testimony, it is true. The two versions of the occurrence are irrreconcilable. The jury, therefore, were compelled to decide a question of veracity; and "it is the most important function of the jury and their peculiar province to determine the truth of the case." People v. Boucher, 303 Ill. 375, 380.

Counsel for the defendant further contend that the preponderance of the evidence does not establish the fact that the dog had a vicious disposition. We do not agree with counsel in their interpretation of the evidence.

Counsel for the defendant maintain on the authority of Domm v. Hollenback, 289 Ill. 382, and Whittenberg v. Weber, 230 Ill. App. 315, that the trial court erred in refusing to allow the defendant to introduce evidence to show that the dog was not vicious, but was gentle and playful. We do not think that the authorities relied on by counsel support their contention. In the case of Domm v. Hollenback, supra, the court said (p. 388):

> "If conclusive proof were made of the propensity of a dog to attack and bite mankind and knowledge of such propensity on the part of the owner, it would be incompetent to show that at some other time the dog was quiet and did not manifest a bad disposition.*** That was not the case here. ** The offers in this case were to prove the uniform good disposition of the dog and his freedom from any disposition to bite or attack mankind or any vicious propensity."

We are of the opinion that in the case at bar the evidence conclusively shows that the dog had a propensity to attack and bite mankind.

In the case of Whittenberg v. Weber, supra, the court held (p. 318) that the defendant "had the right to prove, on the question of whether he had notice of the dog's disposition or propensity to run out and annoy passers-by, the previous uniform good behavior of the dog in that respect, and his peaceable and quiet disposition." In the case at bar the evidence conclusively shows

that the defendant had knowledge of the vicious disposition of the dog. He not only knew of the two previous attacks of the dog on Mrs. Hyde and Howard Martin, but it is undisputed that the dog was kept for the very purpose of protecting the defendant's wife. On direct examination the wife of the defendant was asked this question "Were there any tramps out there, or people of that character around the woods in the neighborhood?" She answered, "Always someone tramping through there, hunting and fishing. There is a trout stream in back of my place, always someone on it." On cross examination she testified that she was left alone a great deal and the dogs were kept for her protection.

Counsel for the defendant further assign error in regard to the giving and refusing of certain instructions. The instructions have not been set out in the brief, as is required. General Platers Supply Co. v. Chas. F. L'Hommedieu & Sons Co., 228 Ill. App. 201, 206. However, we have examined them.

The first instruction complained of is referred to as instruction No. 9. The instruction, which was given at the request of the plaintiff, is as follows:

> "The weight of the testimony does not necessarily depend on the great number of witnesses sworn on either side of the question in dispute, but it is your duty as jurors to consider all the facts and circumstances appearing from the evidence in the case, together with the number of witnesses testifying on the one side or the other, and to determine from that which of the witnesses are worthy of the greater credit; and if you believe from the evidence, under the instructions of the court, after considering all the facts and circumstances appearing from the evidence, and the number of witnesses testifying on the respective sides of this case, that the evidence of the lesser number of witnesses on the one side is more credible and trustworthy than the evidence of the greater number on the other side, then the evidence preponderates on the side of the lesser number of witnesses."

We are of the opinion that if considered as a statement of a universal rule of law applicable to all cases, the instruction is erroneous, since it makes the question of the preponderance of the evidence depend upon the question of the credibility of the

witnesses alone, whereas the preponderance of the evidence should be determined from all the evidence, which in some cases may include not only the statements of witnesses but also documentary evidence, and real or demonstrative evidence. In the case at bar, however, the instruction does not constitute prejudicial error, as the evidence consisted only of the statements of witnesses. In other words, the instruction was applicable to the record in the case at bar. The instruction does not take from "the jury the right to decide on which side the preponderance rested," as counsel for the defendant contend. It merely states,as a matter of law, the standard by which the jury may determine the preponderance of the evidence in the case at bar.

The next instruction objected to is designated as No. 15. The instruction was given at the request of the plaintiff. It is as follows:

> "The court instructs the jury that in law it is not necessary that the defendant should be proven to be the owner of the dog in question. If the jury believe from the evidence that said dog was vicious and accustomed to bite mankind and that the defendant knowingly harbored said dog upon his premises knowing said dog to be of a vicious nature and used to attack and bite mankind, and if the jury further believe from the evidence that said dog did lacerate and bite the plaintiff's throat, breasts, arm and legs, as set forth in her declaration herein, and if the jury believe that the plaintiff was in the exercise of due care for her own safety, then the jury should find a verdict in favor of the plaintiff."

Counsel for the defendant contends that the instruction is erroneous because it fails to limit the care and caution required of the plaintiff "to the time and place in question."

We do not think that the omission constituted prejudicial error,as the instructions must be read as a series; and in instruction No. 12, given at the request of the defendant, the jury explicitly were told that the plaintiff was required to exercise ordinary care and caution for her own safety "immediately prior to and at the time of the alleged attack upon her by the said dog."

It is further contended by counsel for the defendant that the trial court erred in giving, at the request of the plaintiff, the following instruction, referred to as No. 16:

> "In arriving at the fact of whether or not the defendant had knowledge of the vicious character of the dog in question, if any, you will consider all of the facts in the case - such as whether the defendant knew of any acts upon the part of the dog that would indicate to the defendant that the dog would bite if he had the chance, such as attempting to bite any person without provocation, biting any person without provocation, and such similar acts, if any, in proof on the part of the dog which came under the observation of the defendant."

Counsel for the defendant contend that this instruction assumes that the character of the dog was vicious; and that the qualifying phrase "if any" applies only to the clause "and such similar acts," and not to the clause "the vicious acts specifically named." We do not think that the contentions are correct. The phrase "if any" is used twice in the instruction, once to qualify the clause referring to the vicious character of the dog, and again, according to a fair and not a hypercritical construction, to qualify the specific acts mentioned, as well as the clause "and similar acts."

Counsel for the defendant further contend that the court erred in giving the instruction referred to as No. 20. The instruction is as follows:

> "You are instructed if, under the evidence and instructions, you find a verdict for the plaintiff, you shall assess her damages in such sum as you may believe will compensate plaintiff, first, for her physical and mental suffering, if any, directly caused by her injuries; provided such injuries must be the direct result of the force and violence of the attack and striking by the dog; second, if injuries were caused upon plaintiff which are of a permanent character, then you may award her damages such as will reasonably compensate her for permanent injuries."

The objections to this instruction are (1) that "there is no proof in the case of any mental suffering;" (2) that the instruction "allows the jury to speculate upon the supposed permanent character of the plaintiff's injuries;" and that the declaration does not allege, and the evidence does not show, that the

It is further contended by counsel for the defendant that the trial court erred in giving, at the request of the plaintiff, the following instruction, referred to as No. 16:

"In arriving at the fact of whether or not the defendant had knowledge of the vicious character of the dog in question, if any, you will consider all of the facts in the case - such as whether the defendant knew of any acts upon the part of the dog that would indicate to the defendant that the dog would bite if he had the chance, such as attempting to bite any person without provocation, biting any person without provocation, and such similar acts, if any, in proof on the part of the dog which came under the observation of the defendant."

Counsel for the defendant contend that this instruction assumes that the character of the dog was vicious; and that the qualifying phrase "if any" applies only to the clause "and such similar acts," and not to the clause "the vicious acts actually named." We do not think that the contentions are correct. The phrase "if any" is used twice in the instruction, once to qualify the clause referring to the vicious character of the dog, and again, according to a fair and not a hypercritical construction, to qualify the actually vicious acts mentioned, as well as the clause "and similar acts."

Counsel for the defendant further contend that the court erred in giving the instruction referred to as No. 16. The instruction is as follows:

"You are instructed, among the evidence and instructions, you find a verdict for the plaintiff, you shall assess her damages in such sum as you believe will adequately compensate her for her injuries and damages, if any, for the following reasons: First, for her physical and mental suffering, if any, directly caused by her injuries; provided such injuries were the direct result of the force and violence of the dog and striking by the dog; second, if injuries were caused upon plaintiff while she was a peaceable character, then you may award her damages such as will reasonably compensate her for permanent injuries."

The objections to this instruction are (1) that "there is no proof in the case of any mental suffering;" (2) that the instruction "allows the jury to speculate upon the supposed peaceable character of the plaintiff's injuries;" and that the defendant has not sued alone, and the evidence does not show, that the

plaintiff sustained any permanent injuries.

We do not think that the contentions are correct. The plaintiff testified that she was bitten on the neck, right breast, right arm and both legs; that the bite on one leg was to the bone; that she was "bleeding all over;" that she was in a hospital for several weeks. In the case of Pratt v. Davis, 224 Ill. 300, the court said (p. 309): "Some facts require no direct proof. * * The law infers pain and suffering from personal injury."

It has been held that the apprehension of poison from the bite of a dog and the fear and solicitude as to evil results from the bite, are proper matters to be considered in estimating the damages for suffering. Godeau v. Blood, 52 Vt. 251, 254, 255; In re The Lord Derby, 17 Fed. 265, 267.

In regard to the question of permanent injuries the declaration does not aver in terms that any of the injuries were permanent, but the declaration does allege facts from which reasonably it may be inferred that the plaintiff might be permanently injured. Such allegations are sufficient. The rule is that even if the declaration merely describes the injuries generally, without pointing out their seriousness or permanency, recovery may be had to the whole extent of the injuries. Springer v. Schultz, 205 Ill. 144, 146; West Chicago Street R. R. Co. v. McCallum, 169 Ill. 240, 243; Eagle Packet Co. v. Defries, 94 Ill. 598, 603; Little v. Peoria Ry. Co., 215 Ill. App. 385, 389, 390. Furthermore, the plaintiff testified expressly that she "could not do anything with her arm;" that "it is nearly stiff."

It is contended by counsel for the defendant that the court erred in refusing to give an instruction referred to as No. 5, requested by defendant. The instruction is as follows:

plaintiff violated any government letter.

We do not think that the contentions are correct.

The plaintiff testified that she was taken at the wrist, right breast, right eye and left face; that the "pile on her leg was in the front; that he was "slapping all over;" that she was in a hospital for several weeks. In the case of Frank v. Davis, 224 Ill. 500, the court said (p. 508): "Some facts require no direct proof. * * The law defines pain and suffering from personal injury."

It has been held that the expression of pain from the bite of a dog and the fear and solicitude as to evil results from the bite, are proper matters to be considered in estimating the damages for suffering. Dodson v. Hood, 21 Vt. 499, 504, 505; In re The Lord Tenor, 17 Fed. 509, 527.

In regard to the question of permanent injuries the evidence does not show it to be true that any of the injuries were permanent, but the defendants does allege facts from which reasonably it may be inferred that the plaintiff might be permanently injured. Such allegations are sufficient. The rule is that upon if the declaration merely describes the injuries generally, without pointing out their nature, consequences or permanency, recovery may be had to the whole extent of the injuries. Chicago v. Donahue, 208 Ill. 214, 216; Van Dusen Steel Co. v. Kelley, 112 Ill. 270, 277; Peoria Landing Co. v. Dorlan, 94 Ill. 272, 273; Illig v. Peoria Ry. Co., 152 Ill. App. 308, 312, 320. Furthermore, the plaintiff testified emphatically that she "could not do anything with her arm;" that "it is nearly gone."

It is contended by counsel for the defendant that the court erred in refusing to give an instruction referred to as No. 2, requested by defendant. The instruction is as follows:

"The court instructs the jury that even if you believe from the evidence that the plaintiff was injured as alleged in her declaration or one of the counts thereof; if you further find from the evidence and under the instructions of the court, that in approaching defendant's premises, the plaintiff failed to exercise that degree of care and caution which an ordinarily prudent person would have exercised under the same conditions and surroundings, and that such lack of ordinary care and caution (if any) on her part, was the proximate cause of the attack by defendant's dog, then you should find the defendant not guilty."

We think that the trial court properly refused to give this instruction. The instruction omits the element of knowledge on the part of the plaintiff of the vicious disposition of the dog.

There is a diversity of opinion on the question whether contributory negligence in its ordinary meaning is a good defense in an action to recover damages for injuries sustained from the attack of a vicious dog. The Chicago & Alton R. R. Co. v. Kuckkuck, 197 Ill. 304, 309 (supra); 2 Am. & Eng. Enc. of Law, p. 372, (2nd ed.); 2 Cyclopedia of Law and Procedure, pp. 380, 381. The rule in Illinois is stated by the Supreme court in the case of Chicago & Alton R. R. Co. v. Kuckkuck, supra, as follows (pp. 309, 310):

"It is undoubtedly the rule in this state that if the party injured has been guilty of heedlessly placing himself in the way of a vicious dog with knowledge of its propensities, or has brought the injury upon himself by his own conduct, or his fault has proximately contributed to his injury, such facts will constitute a good defense. This defense, however, depends upon knowledge, and it is only after notice that the public are required to be on their guard to avoid injury. It is not necessary for a plaintiff to aver and prove the exercise of care and caution for his own protection, but it is matter of defense."

We are of the opinion that $3000 would be a fair compensation for the plaintiff. If within ten days from the filing of this opinion the plaintiff will remit $1200, we will affirm the judgment; otherwise the judgment will be reversed and the cause remanded.

AFFIRMED UPON REMITTITUR; OTHERWISE REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

"The court instructs the jury that even if you believe from the evidence that the plaintiff was injured as alleged in her declaration or one of the counts thereof; if you further find from the evidence and under the instructions of the court, that in approaching defendant's premises, the plaintiff failed to exercise that degree of care and caution which an ordinarily prudent person would have exercised under the same conditions and surroundings, and that such lack of ordinary care and caution (if any) on her part, was the proximate cause of the accident by defendant's dog, then you should find the defendant not guilty."

We think that the trial court properly refused to give this instruction. The instruction omits the element of knowledge on the part of the plaintiff of the vicious disposition of the dog.

There is a diversity of opinion on the question whether contributory negligence in the ordinary meaning is a good defense in an action to recover damages for injuries sustained from the attack of a vicious dog. The Chicago & Alton R. R. Co. v. Lustrum, 137 Ill. 304 (supra); 2 Am. & Eng. Ency. of Law, p. 278, (2nd ed.); Cyclopedia of Law and Procedure, pp. 380, 381. The rule in Illinois is stated by the Supreme court in the case of Chicago & Alton R. R. Co. v. Kreckmann, supra, as follows (pp. 309, 310):

"It is undoubtedly the rule in this state that if the party injured has been guilty of mere slight or ordinary negligence in the way of a vicious dog with knowledge of its propensities, or has brought the injury upon himself by his own conduct, or his fault has proximately contributed to his injury, such facts will constitute a good defense. This defense, however, depends upon knowledge, and it is only after notice that the public are required to be on their guard to avoid injury. It is not necessary for a plaintiff to go over and prove the exercise of care and caution for his own protection, but it is matter of defense."

We accept the opinion that 6300 would be a fair compensation for the plaintiff. If within ten days from the filing of this opinion the plaintiff will remit $1000, we will affirm the judgment; otherwise the judgment will be reversed and the cause remanded.

AFFIRMED UPON REMITTITUR; OTHERWISE REVERSED AND REMANDED.

Burgett, P. J., and Matchett, J., concur.

140 - 31270

WADE-TWICHELL COMPANY,
a Corporation,
Defendant in Error,

vs.

ANDRINS JANKOITIS,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

See next opinion

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a writ of error prosecuted by Andrins Jankoitis, the defendant, to reverse a judgment by confession obtained against him in the Municipal court of Chicago by the Wade-Twichell Company, the plaintiff.

The action was brought on a written agreement between the plaintiff and the defendant in regard to the purchase of a piano by the defendant from the plaintiff. A note was executed by the defendant payable to the plaintiff. The agreement provided that "the title, ownership or right of possession of the property mentioned" should remain in the payee or the holder of the note until the note was fully paid.

The judgment by confession was entered on April 24, 1925. On May 12, 1925, the defendant was served personally with an execution. On May 29, 1925, the defendant made a motion, supported by his affidavit, to vacate the judgment. On the hearing of the motion, the trial court denied it.

In his affidavit the defendant stated that the first knowledge that he had of the judgment was on May 12, 1925; that by reason of the facts that the files in the case were lost and that the case was numbered on the execution as No. 1778789, instead of No. 1778489, the court number, he and his attorney were delayed in getting an opportunity to examine the files; that he has a good and meritorious defense to the whole of the plaintiff's demand.

See next opinion

The substance of the defendant's defense, as stated in his affidavit, is that the plaintiff did not deliver to the defendant the piano that the defendant selected, and that the plaintiff agreed to deliver, but that the plaintiff delivered to the defendant another piano which was of an inferior and cheaper grade; that as soon as the defendant discovered that the plaintiff had failed to deliver the piano agreed upon, the defendant notified the plaintiff immediately that he would not accept the piano that was delivered and requested the plaintiff to take the piano back; that the plaintiff refused to take back the piano.

We are of the opinion that the trial court erred in denying the motion of the defendant to vacate the judgment.

Counsel for the plaintiff contends that the motion properly was denied for the following reasons: (1) that section 21 of the Municipal Court Act provides that a motion to vacate a judgment shall be made within thirty days after the entry of judgment; and that the motion of the defendant was not made until thirty-five days after the entry of the judgment; (2) that the defendant has not shown due diligence in making his motion; (3) that the affidavit does not state a meritorious defense in that the affidavit does not show that "the piano was returned" to the defendant; and that defendant "cannot retain the piano and at the same time escape paying for it."

In our opinion all of these contentions are unsound.

As we construe section 21 of the Municipal Court Act, it does not apply to judgments entered by confession under a power of attorney or cognovit in the absence of the defendant. It has been held explicitly that the provision of the Practice Act allowing judgments to be set aside "during its term" has no application to judgments entered under a power of attorney or cognovit in the absence of the defendant. Wyman v. Yeomans, 84 Ill. 403, 407;

The submission of the defendant's demurrer, we stated in his affidavit, is that the plaintiff did not deliver to the defendant the plane that the defendant ordered, and that the plaintiff agreed to deliver, but that the plaintiff delivered to the defendant another plane which was of an inferior and cheaper grade; that on seeing the defendant discovered that the plaintiff had failed to deliver the plane agreed upon, the defendant notified the plaintiff immediately that he would not accept the plane that was delivered and requested the plaintiff to take the plane back; that the plaintiff refused to take back the plane.

We are of the opinion that the trial court erred in sustaining the motion of the defendant to vacate the judgment.

Counsel for the plaintiff contends that the action properly was denied for the following reasons: (1) that section 11 of the Municipal Court Act provides that a motion to vacate a judgment shall be made within thirty days after the entry of judgment; and that the motion of the defendant was not made within thirty-five days after the entry of the judgment; (2) that the affidavit does not state a meritorious defense in that the affiant does not state that "the plane was returned" to the defendant; and that defendant "cannot retain the plane and at the same time return it."

In our opinion all of these contentions are unsound.

As we construe section 11 of the Municipal Court Act, it does not apply to judgments entered by default under a power of attorney or warrant in the absence of the defendant. It has been held specifically that the provision of the Practice Act allowing the judgment to be set aside "during the term" has no application to judgments entered under a power of attorney or warrant in the absence of the defendant. Ziegler v. Tennant, 84 Ill. 102, 107;

Hersey v. Alcock, 9 Ill. App. 431, 434. By analogy we think that section 21 of the Municipal Court Act should be similarly construed.

In our view the defendant exercised due diligence in the circumstances in filing his motion to vacate the judgment. The motion was filed seventeen days after the defendant had knowledge of the judgment; and the defendant alleges in his affidavit that he was delayed in filing the motion by reason of the incorrect number on the execution. Furthermore, it does not appear that the rights of the plaintiff have been prejudiced in any way.

We do not think that the affidavit of the defendant is defective in not alleging that the piano was returned to the plaintiff. The rule is well established that unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them. 2 Williston on Sales, sections 496, 497, pp. 1295, 1296, (2nd ed.) To the same effect in principle are the following cases: Conner v. Borland-Grannis Co., 294 Ill. 58, 62; Underwood v. Wolf, 131 Ill. 425, 441; Deane v. Dunham, 79 Ill. 131, 132. The avermants in the defendant's affidavit comply with this rule.

For the reasons stated the judgment of the trial court is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

14 C- 31270

WADE-TWICHELL COMPANY, a Corporation, Defendant in Error, vs. ANDRINS JANKOITIS, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

SUPPLEMENTAL OPINION BY MR. JUSTICE JOHNSTON.

On petition for rehearing counsel for the plaintiff maintains that the court misapprehended the contention of the plaintiff in regard to the power of the Municipal court to vacate a judgment by confession after thirty days have expired from the date of the entry of the judgment; that the precise contention of the plaintiff was not that the Municipal court did not have such power, but that the power could only be exercised when a petition is filed under section 12 of the Municipal Court Act setting forth sufficient grounds; that in the case at bar the defendant did not file a petition, but filed a motion supported by an affidavit, and that therefore the Municipal court had no power to act under section 21.

We do not agree with the contention of counsel for the plaintiff that the motion of the defendant, supported by an affidavit, was not the proper method by which to present the grounds for relief provided for in section 21.

In the case of Harris v. Chicago House Wrecking Co., 314 Ill. 505, 506, under section 89 of the Practice Act, which is similar to section 21 of the Municipal Court Act, it was held that an affidavit without a separate formal motion was sufficient. By analogy we think that in the case at bar the motion supported by the affidavit constituted a substantial compliance with the pro-

SAUK-TWIGGS-LEAGUE, a corporation, Defendant in Error, vs. ALBERTS MUNICIPIS, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

SUPPLEMENTAL OPINION BY MR. JUSTICE JOHNSTON.

On petition for rehearing counsel for the plaintiff maintains that the court misapprehended the contention of the plaintiff in regard to the power of the Municipal court to vacate a judgment by confession after thirty days have expired from the date of the entry of the judgment; that the precise contention of the plaintiff was not that the Municipal court did not have such power, but that the power could only be exercised when a petition is filed under section 12 of the Municipal Court Act setting forth sufficient grounds; that in the case at bar the defendant did not file a petition, but filed a motion supported by an affidavit, and that therefore the Municipal court had no power to act under section 12.

We do not agree with the contention of counsel for the plaintiff that the motion of the defendant, supported by an affidavit, was not the proper method by which to present the grounds for relief provided for in section 12.

In the case of Davis v. Chicago Rapid Transit Co., 244 Ill. 570, 581, under section 22 of the Practice Act, which is similar to section 12 of the Municipal Court Act, it was held that an affidavit without a separate formal motion was sufficient. By analogy we think that in the case at bar the motion supported by the affidavit constituted a substantial compliance with the pro-

visions of section 21.

Counsel for the plaintiff further contend that the opinion of this court should be modified so as to read as follows:

> "For the reasons stated, leave should be given to the defendant to plead to the merits, the judgment in the meantime to stand as security until the merits of the case are heard and determined. The judgment of the court below is reversed and the cause is remanded for further proceedings in accordance with the views herein expressed."

We do not think that the contention is correct. The writ of error in the case at bar was prosecuted to reverse the order of the trial court, which denied the motion of the defendant to vacate the judgment entered by confession. We are of the opinion that the motion should have been allowed. It follows that the order, or as we termed it in the original opinion, the judgment of the trial court, should be reversed and the cause remanded.

55 - 31178

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. ALLIE WESSON, Plaintiff in Error.	ERROR TO CRIMINAL COURT OF COOK COUNTY.

244 I.A. 636

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff in error having been arraigned pleaded not guilty and was tried upon the first count of an indictment charging that on March 18, 1924, "in and upon one Reuben Tyler, in the Peace of the said People of the State of Illinois, then and there being feloniously, unlawfully and maliciously, did with a certain revolver, said revolver then and there being a dangerous and deadly weapon, make an assault with an intent the said Reuben Tyler, then and there unlawfully, feloniously and with malice aforethought, to kill and murder, contrary to the statute, etc."

The jury returned the following verdict:

> "We, the jury, find the defendant, Allie Wesson, guilty of assault with a deadly weapon, in manner and form, as charged in the indictment. And we further find from the evidence that the said defendant, Allie Wesson, is now about the age of twenty-nine years."

Motions for a new trial and in arrest of judgment were over-ruled and judgment entered that:

> "It is considered, ordered and adjudged by the Court, that the said defendant, Allie Wesson, is guilty of the said crime of an assault with a deadly weapon, instrument or other thing, with intent to inflict upon the person of another, a bodily injury, where no considerable provocation appears, and where the circumstances of the assault show an abandoned and malignant heart, upon the indictment in this cause, on said verdict of guilty. **"

Plaintiff in error was then sentenced by the court to the House of Correction for the term of one year and fined $100. To reverse that judgment he has sued out this writ of error. Upon the trial the State's Attorney elected to stand upon the first of three counts in the indictment, and plaintiff in error contends that thi

amounted to an acquittal of the defendant on the other counts, and that the verdict is not responsive to the first count and therefore will not support the judgment entered.

The evidence tended to show that the alleged assault was made at 1504 E. 57th street in the city of Chicago, at the corner of Lake Park avenue, on March 13, 1924, a little after eight o'clock in the morning; that the prosecuting witness, Tyler, went to that place at that time for the purpose of seeing a Dr. Gorgas; that the Doctor was not in when Tyler first went there; that he, Tyler, was reading a newspaper in the stairway, the office door being locked; that plaintiff in error, while the prosecuting witness was reading a newspaper, came towards him with a gun in his hands, and as he, Wesson, got to the stairway, said, "I will kill you," whirled around and as he whirled commenced shooting at Tyler; that one bullet struck Tyler in the back of the neck.

Prior to this time, Tyler and a brother had a flat together, and the defendant roomed with them from 1922 until about March 15th, 1924, - just three days before the shooting. Both Tyler and defendant worked in the postoffice, and the flat in which they lived was at 4454 Calumet avenue. At that time Wesson had been accused by Tyler of having had improper relations with his (Tyler's) wife, and Tyler says that he wished to send his wife to her home in Oklahoma City, and asked Wesson to get $65 or $75 for that purpose, and he says Wesson agreed to do this, and that he, Tyler, told Wesson to give the money to her; that he, Tyler, didn't want it. After this conversation and on the same day Wesson moved, but he did not give any money to either Tyler or Tyler's wife.

Plaintiff in error admits that Tyler accused him at the time in question concerning his, Tyler's wife, but says that Tyler at that time told him in substance that he had a dictaphone in the room and that his wife had made a confession to him, and

amounted to an acceptance of his declaration on the other counts, it
that the verdict is not recommended if Mr. Ford would and Elizabeth
will not accept the judgment without.

The evidence tended to show that the alleged assault
was made at 1824 N. Ayre avenue in the city of Chicago, at the
corner of Lake Park avenue, on March 11, 1924. A little before
eight o'clock in the morning that the complaining witness, Jr.
was to that place at that time for the purpose of meeting a Mr.
Tanner; that Mr. Tanner was not in when Taylor first came there;
that he, Taylor, was waiting a conversation in the vestibule, the
office door being locked; that shortly in order, while the
proceeding without was waiting, a woman, came towards him with
a gun in his hands, and at her, Tanner, got to the vestibule, said,
"I will kill you," without warning and he he walked commenced
shooting at Taylor; that the bullet struck Taylor in the back of the
neck.

Prior to this time, Taylor had a bachelor had a flat
bachelor, and the defendant resided with them from 1919 until March
date 16th, 1924. - Just before then before the shooting. Mrs.
Taylor and defendant worked in the connection, and the flat in
which they lived was at 1824 Chicago avenue. It was that Tanner
occupied flat at Lake Park Lincoln relations with the wife, but
Taylor says that he didn't at such its wife to her home in Indiana
City, Illinois, and asked Tanner to get out of 1824 for that pur-
pose, and he met Tanner agreed to do that, and that he, Taylor,
had Tanner to give the money to her; that he, Taylor, didn't want
it. After this conversation and on the same day Tanner moved,
but he did not give any money to Mrs. Taylor or Taylor's wife.

Testimony in behalf which that Taylor received him at
the time in question concerning his, Taylor's, wife, but very that
time of that time had his wife in existence that he had a discussion
in the room and that his wife had made a confession to him, and

that if he, Wesson, did not give Tyler $150 by two o'clock, he was going to kill him, and that he said, "If you think you can't, tell me now. I will kill you now;" that there was nothing for him to do but consent, which he did. He says that Tyler asked him not to move; that he didn't want anybody to know anything about it, but that on Saturday morning he told Tyler that he was going to prove that the accusation was a lie. He says he was afraid, and didn't know what to do; that he consulted a lawyer, Mr. Westbrooks, and took a leave of absence from the postoffice for ten days.

Plaintiff in error says that on the day of the alleged assault he went to the place in question to see Dr. Gorgas, who had been his doctor for three or four years; that when he got there he saw Tyler standing with his back over against the wall; that Tyler took down his newspaper and gave him "a dirty look" and said, "Wesson, what did I tell you to do? Wesson, what did I tell you to do?" that plaintiff in error replied that he was not bothering Tyler and told him to go away and let him alone; that Tyler said he was not going anywhere; that he came to see the doctor; that Tyler then came back and started down the stairs, and before he passed where plaintiff in error was standing, he put his hand in his right-hand overcoat pocket and plaintiff in error whirled and fired into the ceiling; that he used the gun only with the intention of protecting himself from harm, and that he ceased firing before he had exhausted the shots in the gun.

The testimony of Tyler is corroborated by other witnesses produced by the State; that of plaintiff in error by other witnesses who testified in his behalf.

Plaintiff in error, by his requested instruction No. 5, asked the court to tell the jury "that an assault with intent to kill may be defined as an attempt made by one upon the life of another under such circumstances that, if the attempt so made should result in the death of the person assaulted, the person committing

the assault would be guilty of deliberate murder; and, to sustain a conviction under such a charge, the proof of such facts must be made to the exclusion of every reasonable doubt in the minds of the jury, otherwise you must acquit of that charge. The circumstances attendant upon a homicide may be such that the act is neither justifiable nor excusable and still not be murder, that is, it may have been under such provocation and heat of passion that the killing amounted only to manslaughter. If the circumstances are such that if death ensued the killing would only be manslaughter, the assailant, if death did not ensue, could not be guilty of an assault with intent to murder." The court did not give the instruction exactly as requested, but added thereto this statement: "But the defendant may, if proven guilty beyond a reasonable doubt, be found guilty of an assault with a deadly weapon with intent to inflict a bodily injury."

At the request of the State the court,also instructed the jury, as a matter of law, "that an assault with a deadly weapon, instrument or other thing, with an intent to inflict on the person of another a bodily injury, where no considerable provocation appears, or where the circumstances of the assault show an abandoned or malignant heart, shall subject the offender to a fine not exceeding one thousand dollars nor less than twenty-five dollars, or imprisonment in the county jail for a period not exceeding one year, or both, in discretion of the court."

Plaintiff in error earnestly contends that in giving this instruction and in modifying defendant's requested instruction No. 5, the court erred, because the State elected to proceed under the first count, which charged an assault with the intention to kill and murder, which in effect amounted to an acquittal on the second and third counts, which charged assault with a dangerous and deadly weapon, under circumstances showing an abandoned and malignant heart, with intention to inflict a bodily injury.

[illegible] assault would be guilty of defilement murder; and, to exclude [illegible] convulsion under such a charge, the proof of such fact must be [illegible] to the exclusion of every reasonable doubt in the mind of the [illegible]ry, otherwise you must acquit of that charge. The circumstances [illegible] treatment upon a bandage may be such that she not in reality [illegible] sensibility nor consciousness and still not be murdered, that is, if you [illegible] have been under such provocation and heat of passion that the killing [illegible] amounted only to manslaughter. If the circumstances are such [illegible] that if death caused the killing would only be manslaughter, the [illegible] malicious, if death did not ensue, would not be guilty of an assault [illegible] with intent to murder." The court did not give the instructions [illegible] exactly as requested, but added thereto such modifications that the [illegible] defendant, if guilty, should be convicted of a felonious assault, or [illegible] guilty of an assault with a deadly weapon with intent to inflict a [illegible] deadly injury."

At the request of the State the court also instructed [illegible] jury, as a matter of law, "that an assault with a deadly weapon, [illegible] instrument or other thing, with an intent to inflict on the person [illegible] another a bodily injury, where no constitutable provocation ex[illegible] ists, or where the circumstances of the assault show an abandoned [illegible] and malignant heart, shall subject the offender to a fine not ex[illegible] ceeding one thousand dollars nor less than twenty-five dollars, or [illegible] imprisonment in the county jail for a period not exceeding one year, [illegible] both, in the discretion of the court."

FINDING in error substantially consists that in giving [illegible] definition and in modifying defendant's requested instruction [illegible] 2, the court erred. Because the first clause is proved under [illegible] the first count, which charges an assault with the intention to [illegible] murder, which in effect amounts to an assault at the [illegible] and fight common, which charged assault with a dangerous [illegible] deadly weapon, under circumstances showing no aggravation and [illegible] intent heart, with intention to inflict a mortal injury.

The State admits that instruction No. 10 was erroneous, but argues that plaintiff in error was not injured thereby. It does not attempt to answer the contention of plaintiff in error that the court erred in modifying instruction No. 5.

It was, of course, improper for the court to tell the jury that plaintiff in error might be convicted if the evidence warranted such conviction upon a count which had been withdrawn. Moreover, the instruction was not accurate, even if there had been a count charging the offense. Section 25 of Chapter 38 of the Criminal Code, (see Smith-Hurd's Ill. Rev. Stat. 1923, p. 373) states as elements of the offense there defined, the intention to inflict upon the person of another a bodily injury, where no considerable provocation appears or where the circumstances of the assault show an abandoned or malignant heart. It is apparent then that the instruction, as modified, was improper for the reason that it was not applicable to the count upon which plaintiff in error was tried; and even if there had been such a count, it was not an accurate statement of the law. As was stated in People v. Ellis, 309 Ill. 51, "a verdict of guilty of the crime defined by section 25 could not be returned unless the jury found all the facts which are necessary to establish the defendant's guilt of that particular crime. The verdict must respond to the issues submitted to the jury, and must contain, either in itself or by reference to the indictment, every material element of the crime. (Donovan v. People, 215 Ill. 520; People v. Lemen, 231 Ill. 193.)"

For the reasons indicated the judgment must be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, P. J., and Johnston, J., concur.

82 - 31208

HOLLAND COAL COMPANY, a Corporation, Defendant in Error, vs. A. T. PYFER & COMPANY, a Corporation, and OSCAR WOLFF, Coroner of Cook County, Illinois, Plaintiffs in Error.	ERROR TO CIRCUIT COURT OF COOK COUNTY.

244 I.A. 637

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error were the defendants to a bill in equity filed by the complainant, Holland Coal Company, on August 19, 1924. They seek to reverse a decree entered by the Chancellor after hearing had upon the bill and answer of defendant, Wolff, as coroner, plaintiff in error, A. T. Pyfer & Company, having been defaulted for want of an answer and the bill being taken as confessed as to it.

The bill avers that on July 19, 1924, plaintiff, Holland Coal Company, recovered a judgment at law against one Peter A. Olsen for the sum of $1328.54, which is unpaid and unsatisfied; that complainants sued out a writ of execution on this judgment, on or about July 21, 1924, directed to the Sheriff of Cook County, where Olsen then resided; that the Sheriff made a demand on Olsen; that on August 7, 1924, complainant filed a bond with the Sheriff of Cook County and directed a levy upon certain property of Olsen located at 6620 North Robey street, which property consisted of flowers, bulbs, plants, etc.; that the Sheriff took possession of this property belonging to Peter A. Olsen and held possession of the same up to August 12, 1924, when defendant A. T. Pyfer & Company filed in the Superior court of Cook County a certain writ of replevin; that the coroner, by virtue of this writ, dispossessed the Sheriff of said property.

The bill avers that A. T. Pyfer & Company was acting

in collusion with Olsen; that A. T. Pyfer & Company had filed a bond of $1,000 with the coroner; that the value of the goods was much in excess of that amount; that the property was of a perishable nature; that Pyfer & Company claimed to have a chattel mortgage made and executed by Olsen as mortgagor and recorded in the office of the Recorder of Deeds of Cook County; but complainant was unable to find any record in said office of the same. Complainant represented that the existence of the mortgage was doubtful, but if it did exist it was given and made for an invalid or past consideration and as part of a purely colorable and fraudulent transaction for the purpose of enabling Olsen to evade and circumvent the process of the court and to enable the A. T. Pyfer Company to hold the property as trustee for Olsen; that Pyfer & Company, after dispossessing the Sheriff of Cook County, sold and disposed of certain of these goods and chattels, and were attempting to sell or dispose of the rest and remainder of them, which if consummated complainant would be left without remedy except a suit on the bond, filed in said replevin suit, and which bond was totally inadequate either to satisfy the judgment or compensate the amount of the goods and chattels of which the Sheriff had been dispossessed.

The bill also alleged the existence of certain debts due to Olsen, and that he had an equitable interest in certain things and actions which it asked might be applied to the judgment against him; that he was beneficially interested in some real estate, chattels, real or of some nature or kind, etc.

The bill prayed a full and complete discovery of the property belonging to the defendant Olsen; that the defendants Olsen, A. T. Pyfer & Company and Wolff be required to answer; that the defendants Olsen and Pyfer & Company might be enjoined and restrained from selling or disposing of the property of the judgment debtor; that a receiver might be appointed, and for other and further relief.

The decree recites that the court, upon considering the evidence, hearing the arguments and testimony taken and heard in open court in support of the bill of complaint, finds that it has jurisdiction of the parties and other facts alleged in the bill as to the recovery of judgment, writ of execution, the levy by the Sheriff, the replevin of the goods by the Coroner on the filing of a bond for $1,000, and the dispossession of the Sheriff; that a receiver was appointed on August 21, 1924, and made an inventory of the plants, bulbs, flowers, etc.; that the chattel mortgage claimed as a lease on the plants, flowers, bulbs, etc., by the said A. T. Pyfer & Company was null and void and of no force and effect as against the execution and levy, and that Wolff as coroner, and Pyfer & Company failed to return certain plants, flowers, bulbs, etc., to the receiver, in the amount of $1,350; that the receiver had reported and been discharged; that the complainant Holland Coal Company was damaged by the action of Pyfer & Company and the Coroner to the amount of $1410.45.

It was therefore ordered and adjudged that defendants Pyfer & Company and Oscar Wolff, coroner, should pay over to the claimant the said amount of $1410.45 and the execution should issue therefor.

Plaintiffs in error contend that a court of equity was wholly without jurisdiction under the facts alleged in the bill and found in the decree. It is urged in the first place that the return upon the execution, issued as set forth in the bill, was wholly insufficient to confer jurisdiction on the court for the reason that it was not returned unsatisfied in whole or in part.

If the bill had been brought under Section 49 of the Chancery Act (see Callaghan's Annotated Statutes, 1924, chapter 22) there might be merit in this contention. That section of the statute merely declares the rule which previously existed at

common law, and it is no doubt true that the rule was that the party complainant must, as a condition precedent to obtaining relief in equity, show by his bill that he has exhausted wholly his remedy at law. This is the rule expressed in First National Bank of Sioux City v. Gage, 79 Ill. 207; Durand & Co. v. Gray, 129 Ill., 9, and many other cases upon which the defendants rely.

That is the rule applicable where a judgment creditor seeks to reach and have applied to the satisfaction of his judgment the equitable estate of the debtor. However, as the complainant here points out, there is another line of cases which seems to recognize a different sort of creditor's bill, in which, it is said, the creditor is not bound to go quite so far as that; namely, a bill where he simply seeks to remove a fraudulent encumbrance out of the way of his execution. The distinction between the two kinds of bills has not been very clearly defined, but it seems that in this latter class of bills it is unnecessary to issue an execution prior to the filing of the bill. Miller et al. v. Davidson, 3 Gil. 518, is the leading authority as to the equitable jurisdiction in this kind of bill, and the doctrine there laid down has been followed in many subsequent cases, as in Dillman v. Radelheffer, 162 Ill. 625, where the court said:

> "It is first contended that this is a creditor's bill, and that it cannot be brought until after the return of an execution nulla bona. It is however well settled by the decisions of this court that a bill in equity to remove a fraudulent conveyance out of the way of an execution may be filed as soon as judgment is rendered, and without waiting until execution is returned. Weightman v. Hatch, 17 Ill. 281; Newman v. Willetts, 52 Ill. 98; Amick v. Young, 69 Ill. 542; Wisconsin Granite Co. v. Gerrity, 144 Ill., 77."

It is next contended that the decree must be reversed because service was not obtained upon the judgment debtor, Olsen; and Spear v. Campbell, 5 Ill. 424, and Johnson v. Huber, 134 Ill. 511, are cited.

We do not think, however, the judgment debtor was in

common law, and it is no doubt true that the rule was that the party complained of, as a condition precedent to obtaining relief in equity, show by his bill that he has exhausted his remedy at law. This is the rule announced in Pitts Theological Union of Chicago v. Pope, 99 Ill. 274; Dunand v. Ill. R. R. Co., 99 Ill. 132, and many other cases upon which the defendants rely.

Conceded. But is this rule applicable where a judgment creditor seeks to reach and have applied to the satisfaction of his judgment equitable estate of the debtor. However, as the authorities have pointed out, there is another line of cases which seem to indicate a different rule of creditor's bill, in which, it is said, the creditor is not bound to go quite so far on that; namely, a bill where he simply seeks to remove a fraudulent encumbrance out of the way of his execution. The distinction between the two kinds of bills has not been very clearly defined, but it seems that in this latter class of bills it is unnecessary to issue an execution prior to the filing of the bill. Miller v. Thatcher, 2 Ill. 718, is the leading authority as to the equitable jurisdiction in this kind of bill, and the doctrine there laid down has been followed in many subsequent cases, as in Mitchell v. Hatfield, 48 Ill. 239, where the court said:

> "It is first contended that this is a creditor's bill, and that it cannot be brought until after the return of an execution unsatisfied. It is however well settled by the decisions of this court that a bill in equity to remove a fraudulent encumbrance out of the way of an execution may be filed as soon as judgment is rendered, and without waiting until execution is returned. Kellogg v. Ward, 17 Ill. 826; Hamson v. Millard, 22 Ill. 99; Quinn v. Tucker, 40 Ill. 248; Plummer Foundry Co. v. Dwyer, 144 Ill., 19."

It is next contended that the decree must be reversed because service was not obtained upon the judgment debtor, Olson; citing Sager v. Campbell, 5 Ill. 494, and Kirkham v. Taylor, 124 Ill. 11, and others.

We do not think, however, the judgment debtor was in

this case an indispensable party. He would have been a proper party but was not a necessary one, since the decree does not purport to set aside any conveyance made by him in which he has given covenants of warranty. Quinn v. People, 146 Ill. 275, affirming 45 Ill. App. 547.

The defendants, plaintiffs in error, point out that material averments of a bill in equity which are neither admitted nor denied, must be supported by the proof; that the evidence must be either preserved by certificate or the decree must find specific facts proved at the hearing which are prima facie sufficient to sustain the decree; that where a joint decree is rendered against two defendants and there are no allegations in the bill upon which the decree is found against one, or proof against one, it must be reversed as to both; that a decree pro confesso admits only the facts properly alleged, but not that such facts authorize equitable relief, or give the court jurisdiction of the subject matter. These are elementary propositions, which may be conceded, but which are, we think, wholly immaterial here, since the finding of facts in the decree and the allegations in the bill are, in our opinion, sufficient to justify the relief granted.

It is further contended that the court erred in retaining jurisdiction to determine and settle purely and solely legal rights, and that it is urged that in entering a money judgment the court deprived the defendants of their constitutional right of a trial by jury. Brauer v. Laughlin, 235 Ill. 265; Fleming v. Rehcis, 275 Ill. 132, are cited and relied on.

We do not think that there is any controversy as to the rule applicable in such a case. If the equities appearing are insufficient to give the court jurisdiction, then a court of equity should not proceed to give relief upon a purely legal demand. That, however, is not the case here, since the decree finds that

[illegible] case an indispensable party. It would have been a proper
[illegible]rty but was not a necessary one, since the decree does not
[illegible]ssary to set aside any conveyance made by him in which he has
[illegible]tion assignee of rentals. Allen v. Fowler, 146 Ill. 478, 481-
[illegible]ing 43 Ill. App. 587.

The defendants, plaintiffs in error, point out that
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[illegible]ts proved at the hearing which are prima facie sufficient to
[illegible]ify the decree; that where a joint decree is rendered against
[illegible] defendants and there are no allegations in the bill upon which
[illegible] decree is found against one, or proof against one, it must be
[illegible]ersed as to both; that a decree with reference must only be
[illegible] properly alleged, but not that such facts authorize equitable
[illegible]ief, or give the court jurisdiction of the subject matter.

[illegible] are elementary propositions, which may be conceded, but which
[illegible]d, we think, wholly inapplicable here, since the finding of facts
[illegible] the decree and the allegations in the bill are, in our opinion,
[illegible]ficient to justify the relief granted.

It is further contended that the court erred in re-
[illegible]ding jurisdiction in (illegible) and holding that equity
[illegible] right, but (illegible) it was not in order that to entitle a court of
[illegible] the court derived the jurisdiction of their controversy
[illegible] right of a trial by jury. Bishop v. Lumbard, 58 Ill. 267;
[illegible]ington v. Sawyer, 77 Ill. 114, and cases cited and relied on.

We do not think that there is any controversy as to
[illegible] rule applicable in such a case. If the equities appertaining
[illegible] institutions to give the court jurisdiction, then a court of
[illegible]ity should not proceed to give relief upon a purely legal demand
[illegible]. However, in not the case here, since the decree finds that

the chattel mortgage, under color of which defendant A. T. Pyfer & Company claimed, is null and void. Having so decreed, the court of equity could do full justice between the parties by entering a judgment as at law for the value of the property which has been wrongfully taken by means of a replevin writ obtained by filing an inadequate bond.

The decree is just and is affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

101 - 31230

MAE DAVIS, Appellant,	)	
vs.	)	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.
MISSOURI STATE LIFE INSURANCE COMPANY, Appellee.	)	

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff brought suit as the beneficiary of two life insurance policies dated July 28, 1922, for the sum of $5,000 each, issued on the life of her deceased husband, who died on September 7, 1922.

The defenses pleaded were the general issue, and that the policies were never issued, never became binding policies, and that the first premium was never in fact paid.

At the close of plaintiff's evidence defendant requested an instruction to the jury in its favor, which the court gave and entered judgment on the verdict returned in response to the instruction.

The controlling question in the case is whether the court erred in directing the verdict. The rule to be applied in deciding that question is well settled in this state. It is error to give such an instruction for a defendant, where there is any evidence from which the jury could reasonably find in favor of the plaintiff, and in ruling upon such motion the plaintiff is entitled to the benefit of all the evidence in her favor, considered in the aspect most favorable to her. Likewise, the plaintiff is entitled in such case to the benefit of all presumptions and inferences which may reasonably be drawn from the evidence, and contradictory evidence or explanatory circumstances in evidence should be rejected. (McCune v. Reynolds, 288 Ill. 188; Hunter v. Troup, 315 Ill. 293; Pluym v. Ill. Central R. R. Co., 220 Ill. App. 554;

Eastern Farmers' Grain Co. v. Fernandes Grain Co., 229 Ill. App. 102.)

Could a jury reasonably find from the evidence in this record that a contract of insurance had been in fact made? In considering that question, it is conceded by the parties that the same principles and rules should be applied as would be applicable in determining the existence or non-existence of any other contract.

The facts disclosed by the evidence are as follows:

The defendant Life Insurance company has its home office at St. Louis, Missouri. At the time of the transactions out of which this controversy arises it was represented at Springfield, Illinois, by one W. D. Stacy, general agent. On the 13th of July, 1922, at Decatur, Illinois, Arthur Davis, the deceased husband of the plaintiff, through Mr. Stacy, made an application in writing for two life insurance policies of the Ordinary Life Non-Participating plan, the annual premium upon such policies being $309. The application stated that the applicant had not paid the agent anything. The application further provided:

> "(c) That if the first premium for the insurance hereby applied for be not paid to the Agent at the time of making this application, or if the policy be issued for a less amount or on any other plan than that for which this application is made, the insurance shall not be effective until the policy is delivered to and accepted by me and the first premium thereon actually paid during my lifetime and continued in good health, but upon such delivery, acceptance and payment during my lifetime and continued good health the policy shall be deemed to have taken effect from and shall bear the date of approval at the Home Office or other date specifically requested by the applicant, on which date in each year thereafter subsequent premiums will be due and payable."

The application was examined on July 13th, and because of facts disclosed thereby, the company secured a further partial examination and declined to issue the policy as requested in the application, but approved it for what was known as a Table III basis, Form A. policy, with no extended insurance and for an annual premium of $437.60.

Two policies of this kind were sent to Mr. Stacy,

general agent, at Springfield. Defendant directed Mr. Stacy that the policies must not be delivered until the attention of the applicant was called to these changes. At the time that Stacy took the application for the insurance he also accepted two notes of the applicant for $109 and $300, respectively, which in the aggregate represented the amount of the first year's premium on the policies upon the basis on which the application was made. It was the custom of Stacy thus to accept notes from applicants for insurance.

At this time Arthur Davis was in the Shrine circus business at Fort Wayne, Indiana. This business at different times during the summer took him to Springfield, Illinois, and Decatur, Illinois, and the negotiations with Stacy for this insurance were carried on at these places. While these negotiations were pending Mr. Stacy met Mr. and Mrs. Davis at the postoffice in Decatur and talked with them about this insurance. Mrs. Davis said that she didn't think that Mr. Davis could afford it right at that time, and Mr. Stacy replied that it would be all right, saying, "I will take care of it. I will put the notes in the vault and no one needs to know anything about it." Mrs. Davis did not think that this ought to be done, and she told Stacy that she didn't think that Mr. Davis should give the notes; that she wanted him to pay, if he was going to take the policy to take it up. Mr. Stacy said that it was perfectly all right with him, that he should take care of it, and that if Mr. Davis could not pay up right at the time when it was due, he would renew the notes. She said that Mr. Davis should not pay the money out; that he needed the money for his business; but Stacy said that was all right, he would take care of it; he would put the notes in his vault and send the money on to the company. "He said he would take care of the notes and keep them. Mr. Stacy said he would take Mr. Davis' notes. He said he wanted to take his notes;

general agent, at Springfield. Instructions directed Mr. Stamp that the policies must not be delivered until the estimates of the applicants were mailed to these changes. At the time that Stamp took the application for the insurance he also accepted two notes of the applicants for $100 and $200, respectively, which in the aggregate represented the amount of the first year's premium on the policies upon the basis on which the application was made. It was the custom of Stamp this to accept notes from applicants for insurance.

At this time Arthur Davis was in the driving circus business at Fort Wayne, Indiana. This business at different times during the summer took him to Springfield, Illinois, and Decatur, Illinois, and the negotiations with Stamp for this insurance were carried on at these places. While these negotiations were pending Mr. Stamp met Mr. and Mrs. Davis at the postoffice in Decatur and talked with them about this insurance. Mrs. Davis said that she didn't think that Mr. Davis would afford it right at that time, and Mr. Stamp replied that it would be all right, saying, "I will take care of it. I will put the notes in the vault and no one needs to know anything about it." Mrs. Davis did not think that this would be so nice, and she told Stamp that she didn't think that. Davis argued the matter that she wanted him to pay, if he was going to take the policy to take it up. Mr. Stamp said that it was perfectly all right with him, that he should take care of it, and that if Mr. Davis could not pay up right at the time when it was due, he would renew the notes. He said that Mr. Davis should not pay the money out; that he needed the money for his business; but Stamp said that was all right, he would take care of it; he would put the notes in his vault and send the money on to the company. He said he would take care of the notes and keep them. Mr. Stamp said he would take Mr. Davis' notes. He said he wanted to take his notes;

that Mr. Davis didn't know to whom to pay it. He would take charge of the notes. He would renew them and give Art all the time he wanted."

Porter W. Pemberton was engaged in the circus business with Arthur Davis. In the summer of 1922 and after the policies in question were in the hands of Stacy, Mr. Pemberton met Stacy, whom he knew, at the railroad station in Springfield, Illinois. At that time Arthur Davis was in Chicago. Mr. Pemberton says that at that time Mr. Stacy told him, Pemberton, that he, Stacy, was going to Fort Wayne, Indiana, where Mr. Davis was to stage a Shrine circus. Pemberton told Stacy that Mr. Davis was not in Fort Wayne at that time; that he was in Chicago, and that if Stacy wanted to see Mr. Davis he should go to Chicago. Stacy replied that he would not go to Chicago; that he would go down to Fort Wayne where the circus was and see Davis.

Stacy asked Pemberton at that time if he, Pemberton, was going to see Mr. Davis when he went back to Chicago, and Pemberton told him, "Yes." Stacy then told Pemberton to tell Mr. Davis "that hethad his insurance all fixed up for him. The only difference was at a higher rate due to some shortness or overweight, or something to that effect, and that when he came to Fort Wayne he would arrange the matter. Mr. Stacy explained approximately or precisely the difference in the premium of the policy to be issued from that rate." Stacy told Pemberton "to tell Art" (meaning Mr. Davis) that.

The next day Pemberton saw Davis and told him what Stacy had said and Davis replied, not in exact words but substantially, that it was all right, and he was glad that it was fixed up. Pemberton also told Davis about the other arrangements that they (meaning Stacy and Davis) were to meet in another place afterwards, and Mr. Davis said something about fixing up a note as near as he could remember it or understand it; that he had given Bill Stacy

that Mr. Davis didn't know to whom to pay it. He would take charge of the notes. He would renew them and give out all the time he wanted."

Parker W. Pemberton was engaged in the clothing business with Arthur Davis. In the summer of 1930 and after the problems in question were in the hands of Stacy, Mr. Pemberton met Stacy, whom he knew, at the railroad station in Springfield, Illinois. At that time Arthur Davis was in Chicago. Mr. Pemberton says that at that time Mr. Stacy told him, Pemberton, that Mr. Stacy, was going to Fort Wayne, Indiana, where Mr. Davis was to stage a Burning circus. Pemberton told Stacy that Mr. Davis was not in Fort Wayne at that time; that he was in Chicago, and that if Stacy wanted to see Mr. Davis he should go to Chicago. Stacy replied that he would not go to Chicago; that he would go home to Fort Wayne where the circus was and see Davis.

Stacy asked Pemberton at that time if he, Pemberton, was going to see Mr. Davis when he went back to Chicago, and Pemberton told him, "Yes." Stacy then told Pemberton to tell Mr. Davis that "all his insurance all fixed up for him." The only difference was at a higher rate due to some misfeasance or overweight, or something to that effect, and that when he came to Fort Wayne he would arrange the matter. Mr. Stacy explained supernaturally or practically the difference in the premium of the policy to be issued from that of Mr. Stacy said Pemberton "to tell Art" (meaning Mr. Davis) that.

The next day Pemberton saw Davis and told him what Stacy had said and Davis replied, not in exact words but substantially, that it was all right, and he was glad that it was fixed up. Pemberton also told Davis about the other arrangements that they (meaning Stacy and Davis) were to meet in another place afterwards. Mr. Davis said something about taking up a note as near as he could remember it or understand it; that he had given BILL Stacy

notes for the premium at the original rate; but Stacy and Davis did not meet at the appointed place. Pemberton says that Davis said substantially to him, "That's all right. I am glad it is fixed up."

Pemberton had never had any business whatever with Stacy; he was concession manager of the Arthur Davis Amusement Company, and had an interest in the concession and of it only; he was working on a percentage basis, and he conducted the concessions independently as his own business. He had known Mr. Davis prior to his death probably three or four years. He had met Stacy every day or night of a week in which the circus was given at Springfield. He says that he was with Stacy at the railroad station for fifteen minutes, and that he does not recall having had a conversation prior to that time with Mr. Stacy about this insurance. Davis did not say anything about any note, and Pemberton never had any further conversation with Mr. Stacy about the policy. He testified that he did not know whether Davis ever gave a note for the increased premium or not. Davis, the evidence indicates, was and continued to be in good health up to the time he met his death in an accident.

On October 14, 1922, after the death of Davis, the defendant refused a tender from the attorney for the plaintiff beneficiary of a cashier's check for the sum of $238.61, representing the difference in premium between the policies applied for and the ones which were in fact sent by defendant to Stacy.

On September 13, 1922, after the death of Arthur Davis, the policies, which had up to that time been in the possession of Mr. Stacy, were by him returned to the home office at St. Louis, and on September 15, 1922, the defendant company, in response to a letter from the attorney for the plaintiff, wrote in part as follows:

"The application to us was for $10,000 for two policies of $5000 each, and was dated at Decatur, Ill., July 13, 1922. The application was for two policies on the Ordinary Life Non-Participating Plan, and the annual premium on such policies is

$309.00 per annum. In the application the applicant said he had not paid the agent anything.

The application was examined on the 13th of July, and this examination is Part II of our application. Because of the facts disclosed in that examination this company secured a further partial examination and declined to issue the policy in accordance with the application, but did approve it on a Table III basis, Form A. with no extended insurance, and for an annual premium of $437.60, and issued two policies of that kind, sending them to Mr. Stacy, our General Agent at Springfield, and called his attention to this change, and directed that the policies must not be delivered until the attention of the applicant was called to these changes.

Mr. Stacy advises that he had not had an opportunity to present these policies to the applicant, and advise him of the action of the Company.

Mr. Stacy at the time of making the application, as we are now advised, took two notes, one for $100.00 and one for $200.00, and we are today requesting him to return these notes to the proper representative of Mr. Davis, inasmuch as these notes were made payable to the order of W. D. Stacy."

We have recited the material evidence in time sequence and are constrained to hold that it was insufficient to require any material issue to be submitted to the jury. An examination of the written application discloses that it was in the contemplation of the parties that insurance might possibly be issued on a different plan than that for which the application was made. The application expressly states the conditions upon which such different policies, if issued, should become effective. Three conditions were expressed - first, that the policy should be delivered to the applicant; second, that it should be accepted by him; and, third, that the first premium should actually be paid during the lifetime of the applicant.

When the policies sued on were transmitted by the defendant to its agent, Stacy, it added the further direction that the changes in the policies should be called to the attention of the applicant before it was delivered. If we assume that Stacy, as general agent, had authority to waive the condition as to the payment of the first premium, that he might extend credit on his own responsibility, or if we further assume that a manual de-

$200.00 per annum. In the application the applicant said he had not paid the agent anything.

The application was examined on the 14th of July, and with consideration he fixed it at our application. Examine of the Ferry discovered in that examination this company assuming a further partial examination and desired to know the policy be examined with the application, but did approve it as a Table XIX Bonus. From A. when he entered insurance and for an annual premium of $427.40, and issued the policies of that kind, sending them to Mr. Mary, our General Agent at Springfield, and taking his acknowledgment in this change, and directed that the policies must not be delivered until the attention of the applicant was called to these changes.

Mr. Mary advises that he had not had an opportunity to present these policies to the applicant, and advise him of the action of the Company.

Mr. Mary at the time of making the application, as we his day advised, took the notes, one for $200.00 and one for $[illegible], and we are being requesting him to return these notes in the proper proportionate of Mr. Mary, inasmuch as these notes were made payable to the order of W. M. Mary.

We have tested the material evidence in this examination and are satisfied to hold that it was insufficient to require any material issue to be submitted to the jury. In consideration of the written application disclosed that it was in the contemplation of the parties that insurance might usually be issued on a different plan than that for which the application was made. The application correctly states the conditions upon which such different policies, if issued, would issue effective. These conditions were contained - that the policy would be delivered to the assured; that it would be accepted by him; and, that the first premium should actually be paid during the lifetime of the applicant.

When the policies had on were transmitted by the defendant to the agent, Mary, it sent the Fidelity Mutual the change in the policies which should be called to the attention of the applicant before it was delivered. If we assume that Mary, as general agent, had authority to waive the condition as to the payment of the first premium, that he might extend credit on his responsibility, or if we further assume that a mutual de-

livery of the policies was unnecessary, the evidence still comes short of presenting a question for the consideration of the jury, for the reason, among others, that it does not disclose a waiver by Stacy of the payment of the first premium, but on the contrary tends to prove an agreement according to the terms of which the payment was to be made through the acceptance by Stacy of the notes of the applicant; and there is not a scintilla of evidence tending to show that the parties intended any delivery of the policies to be other than manual, while there is an entire absence of evidence tending to show that Davis ever in fact accepted the policies on which suit is brought.

The evidence of Mrs. Davis on the question of payment of the first premium tends to show, not a waiver of the payment but an agreement by which, through the use of the notes of Davis, payment was to be made. Her testimony is positively to the effect that Stacy agreed to take the notes of Davis and renew them if necessary, he, Stacy, advancing the necessary funds to pay the premium. That clear evidence makes it impossible to believe that Davis ever for a moment supposed that the policies would be in effect until his notes for the amount of the first premium had been delivered to Stacy. He did not make and deliver the notes to meet the payment of the premium for the policies offered; he did not offer to do so, nor when informed by Pemberton, at Stacy's request, that policies of a different kind than those applied for were offered, did he say to Pemberton that he would execute these notes or communicate further with Stacy about it, nor request Pemberton to do so.

The briefs and arguments of the parties discuss at length the supposed agency of Pemberton. If we grant that it may be inferred from the evidence that Stacy intended to make Pemberton his agent to communicate an offer to Davis, there is no evidence

liery of the politics was unnecessary, the evidence still cannot of procuring a question for the consideration of the jury, for the reason, among others, that it does not disclose a waiver by Stony of the payment of the first premium, but on the contrary tends to prove an agreement according to the terms of which the payment was to be made through the appearance by Stony of the notes of the applicant; and there is not a scintilla of evidence tending to show that the parties intended any delivery of the policies to be other than manual, while there is an entire absence of evidence tending to show that Davis ever in fact accepted the policies on which suit is brought.

The evidence of Mrs. Davis on the question of payment of the first premium tends to show, not a waiver of the payment but an agreement by which, through the use of the notes of Davis, payment was to be made. Her testimony is positively to the effect that Stony agreed to take the notes of Davis and renew them if necessary, so, Stony, advancing the necessary funds to pay the premium. That other evidence makes it impossible to believe that Davis ever for a moment entertained that the policies could be in effect until his notes for the amount of the first premium had been delivered to Stony. He did not make and deliver the notes to meet the payment of the premium for the policies offered; he did not offer to do so, nor when informed by Pemberton, at Stony's request, that policies of a different kind than those applied for were offered, did he say to Pemberton that he would execute those notes or communicate further with Stony about it, nor request Pemberton to do so.

The briefs and arguments of the parties discuss at length the supposed agency of Pemberton. If we grant that it may be inferred from the evidence that Stony intended to make Pemberton his agent to communicate an offer to Davis, there is no evidence

in the record from which a jury could reasonably infer that he was made the agent to receive the reply of Davis to that offer, or that he was in any way authorized to close up the transaction. He was not intrusted with the policies. Indeed, the evidence fails to disclose that he had any definite knowledge of what the policies contained, or of the respects in which these policies differed from those for which Davis had applied.

We think no more can be inferred from the evidence on this point than a request by Stacy to Pemberton to tell Davis that the policies awaited his acceptance or rejection. The evidence of Pemberton is to the effect that Stacy said to him in substance that when he (meaning Davis) came to Fort Wayne he would arrange the matter. Pemberton also testifies that Davis replied substantially that it was all right and he was glad that it was fixed up, but this, in connection with all the other evidence, can reasonably mean no more than the affirmance by Davis that he would be ready to meet Stacy at Fort Wayne and there arrange the whole matter. It is apparent that if it had been the intention of the parties that the communication from Stacy to Davis, through Pemberton, and its acceptance by Davis, should conclude the contract, there would be no occasion for a trip to Fort Wayne on the part of Stacy. Indeed, in our opinion the utmost authority for Pemberton, which can be inferred from the evidence, is that he was requested to act as a messenger.

No jury could reasonably find from this testimony that it was the intention of either of the parties that the conversation between Davis and Pemberton should result in a binding contract. That both Pemberton and Davis so understood it is indicated by the fact that so far as the evidence discloses, Pemberton never communicated to Stacy the reply of Davis, and apparently did not think that there was any duty resting upon him to do so.

An agreement which results in a contract must be mutual. If defendant was bound, then Davis was bound. Upon the facts disclosed here, would it be for a moment contended that the Insurance company could have recovered in a suit against Davis the amount of the premiums on these policies? It is apparent that the answer must be in the negative. Davis was not bound; therefore the Insurance company was not bound. The evidence fails to disclose that there was a meeting of the minds of the parties, or a definite agreement between them as to terms.

Because the evidence discloses that there was no provision for the payment of the premium on these policies in the manner agreed upon, because from the whole evidence submitted it is apparent that there was no delivery of the policies, and because the evidence fails to disclose facts from which a jury could reasonably find that the minds of the parties met in regard to the terms of the policies, the instruction to return a verdict for defendant was properly given.

Plaintiff also contends that the defendant is precluded from setting up a defense other than that stated in its letter refusing payment. Ohio & Miss. Ry. Co. v. McCarthy, 96 U. S. 258; I. C. R. R. Co. v. Seitz, 214 Ill. 380, and other similar cases are cited to this point. The letter, however, is not inconsistent with the defense that there was no contract between the parties. The cases cited are not applicable. (See 13 Corpus Juris, 699, sec. 800.)

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

119 - 31248

GUARDIAN NATIONAL BANK OF CHICAGO,
Appellant,

v.

F. J. LEWIS MFG. CO., (a corporation), and STANDARD TRUST & SAVINGS BANK,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

244 I.A. 637 3

See Next Opinion

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the plaintiff in a replevin suit from a judgment for defendant entered on the finding of the court.

The material facts are not disputed and appear to be that a bank in Ohio sent seven bonds of the par value of $1,000 each and by their terms payable to bearer to the plaintiff bank at Chicago. Plaintiff delivered these bonds to Hyney Emerson & Company, a bond house, taking a trust receipt therefor, by which Hyney Emerson & Company undertook to hold the bonds as bailee for the account of plaintiff and subject to its order. By the terms of this receipt, Hyney Emerson & Company further undertook to return the bonds to plaintiff on September 12, 1925.

These bonds were not returned and have not been paid for. On the contrary, on or about September 15, 1925, the defendant F. J. Lewis Manufacturing Company, through the defendant Standard Trust & Savings Bank, received these bonds in a transaction which the defendants insist amounted to a purchase but which plaintiff argues was in fact in the nature of a loan, because of an agreement in writing delivered at the

time in which the seller, Hyney Emerson & Company, promised at the option of the defendant F. J. Lewis Manufacturing Company, to repurchase these bonds within a given time at a slight advance in price, this being one of several similar transactions between the F. J. Lewis Manufacturing Company and Hyney Emerson & Company.

The plaintiff says that this transaction amounted to a short time loan and was therefore ultra vires the power of the defendant F. J. Lewis Manufacturing Company, and that as against the plaintiff, it therefore failed to acquire title to the bonds.

Plaintiff concedes that if the defendant F. J. Lewis Manufacturing Company, is a holder in due course for value, plaintiff cannot recover.

The court indicated by its rulings on propositions of law that the theory of the court was that the transaction, by which the bonds were acquired, amounted to a purchase; that the defendant corporation, however, had no power to make short time loans, but that the transaction was not ultra vires that corporation.

We think defendant F. J. Lewis Manufacturing Company was a holder for value in due course (Smith Hurd's Illinois Revised Statutes, 1925, chap. 98, page 1763, section 72), and therefore, as against the plaintiff, took a good title. (Murray v. Lardner, 2 Wall. 110; Jones v. Nellis, 41 Ill. 482; Metcalf v. Draper, 98 Ill. App. 399; Drumm Construction Co. vv. Forbes, 309 Ill. 303.)

Moreover, plaintiff is not in privity and hence as against the defendant F. J. Lewis Manufacturing Company cannot base its claim to the bonds on the doctrine of ultra vires.

time in which the notice, Byrne Amerson & Company, promised at the option of the defendant T. J. Lewis Manufacturing Company, to repurchase these bonds within a given time at a slight advance in price, this being one of several similar transactions between the T. J. Lewis Manufacturing Company and Byrne Amerson & Company.

The plaintiff says that this transaction amounted to a short time loan and was therefore _illegal_ _usury_ the power of the defendant T. J. Lewis Manufacturing Company, and that as against the plaintiff, it therefore failed to acquire title to the bonds.

Plaintiff concedes that if the defendant T. J. Lewis Manufacturing Company, is a holder in due course for value, plaintiff cannot recover.

The court instructed by its ruling on propositions of law that the theory of the court was that the transaction, by which the bonds were acquired, amounted to a purchase; that the defendant corporation, however, had no power to make short time loans, but that the transaction was not _illegal_ _usury_ that corporation.

We think defendant T. J. Lewis Manufacturing Company was a holder for value in due course (_Smith Mfg._ v. _Illinois Trust Savings Bank_, 1908, 234 Ill. 90, page 1763, section 73); and therefore, as against the plaintiff, took a good title. (_Bowman v. Hunter_, 2 Will. 1787; _Tyson v. Bailey_, 4 Ill. 444; _Bright v. Ingersoll_, 28 Ill. 477; _Brown Construction Co. v. Tucker_, 309 Ill. 308.)

Moreover, plaintiff is not in privity and hence as against the defendant T. J. Lewis Manufacturing Company cannot have the claim to the bonds on the doctrine of _illegal_ _usury_.

(Rector v. Hartford Deposit Co., 190 Ill. 380; Western Telephone Mfg. Co. v. Foley, 150 Ill. App. 343; American Credit Co. v. Worthington, 191 Ill. App. 177.

Further, we think plaintiff cannot at any rate maintain its suit without first making a demand for the bonds, of which there is no proof in the record. (Ohio & M. R. Co. v. Noe, 77 Ill. 513; Clark v. Lewis, 35 Ill. 417; Rosenbaum v. King, 114 Ill. App. 648.)

The theory of plaintiff is ingenious but cannot avail under the facts which appear in this record. Judgment will be affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

119 - 31248

GUARDIAN NATIONAL BANK OF CHICAGO, Appellant, vs. F. J. LEWIS MANUFACTURING COMPANY, a Corporation, and STANDARD TRUST & SAVINGS BANK, Appellees.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

SUPPLEMENTAL OPINION.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff in its petition for a rehearing complains that the court reached its conclusion that the F. J. Lewis Manufacturing Company was a holder in due course for value "without surmounting the hurdle that the transaction involved in this case is or is not a short term loan," and it again asserts that the transaction amounted to such a loan and that being ultra vires the corporation, the corporation derived no title to the bonds. Leigh v. American Brake-Beam Co., 208 Ill. 147; Calumet & Chicago Canal & Dock Co. v. Conkling, 273 Ill. 318; Mercantile Trust Co. v. Kaster, 273 Ill. 332, are again cited.

There are two answers to this contention. In the first place, the transaction under consideration was not a short time loan, and, in the second place, even if it was such a loan, it was not (in our opinion) ultra vires the corporation.

The trial court specifically held that the transaction in which defendant took the bonds was not a loan.

The agreement between the Hyney Emerson Company and the F. J. Lewis Manufacturing Company is in writing, and in its plain language indicates the intention of the parties that the transaction should be in the nature of a sale with an agreement that the seller might within a given time thereafter, at the option of the vendee, purchase the bonds at an advanced price, but the purchaser did not

APPEAL FROM MONTCLAIR.

Short on (claim).

INTERLOCUTORY OPINION.

MR. JUSTICE MATTHEWS DELIVERED THE OPINION OF THE COURT.

Plaintiff in its petition for a rehearing complains that the court reached its conclusion that the F. J. Davis Manufacturing Company was a bidder in the course for valve "without ever mentioning the fact that the transaction involved in this case is not a sale from Davis to Sears," and to again assert that the transaction amounted to such a loan and that being using the corporation, the corporation derived no title to the bonds. Lehigh [illegible] Mfg. Co. v. Kneeland, 223 U.S. 319; Commonwealth Trust Co. v. [illegible], 272 U.S. 318, are again cited.

There are two answers to this contention. In the first place, the transaction under consideration was not a short sale loan, and, in the second place, even if it was such a loan, it was not (in our opinion) using the corporation.

The trial court specifically held that the transaction in question defendant took the bonds was not a loan.

The agreement between the Kraft Bowman Company and the F. J. Davis Manufacturing Company is in writing, and in its plain language indicates the intention of the parties that the transaction should be in the nature of a sale with an agreement that the seller might within a given time thereof, at the option of the vendee, return the bonds at an advanced price, but the purchaser did not

agree or bind itself to resell the bonds at that price.

Mr. Lewis, the chairman of the board of directors of the defendant manufacturing company, testified that the company had surplus funds on hand which it wished to invest for a short time -- thirty or sixty days -- and this was the reason why they were willing to buy the bonds on the thirty-day repurchase agreement. He also testified that the company had quite a number of similar transactions every fall. Plaintiff argues that this evidence is contradictory of and inconsistent with the written evidence and conclusively contradicts it. We do not think so. The finding of the trial court is entitled to the same weight as the verdict of a jury, and we cannot say that its finding in this respect is contrary to the weight of the evidence.

But even if we could find (contrary to the trial court) that the transaction in question was a loan, we do not think it would be ultra vires the powers of this corporation, or that Mercantile Trust Co. v. Kastor, Calumet & Chicago Canal & Dock Co. v. Conkling, Leigh v. American Brake-Beam Co., supra, would be applicable.

The defendant manufacturing company, the record shows, was incorporated under the General Incorporation Act. By its charter, as amended, it was given authority "To engage in any other manufacturing, mining, construction or transportation business of any kind or character whatsoever, and to that end to acquire, hold, own and dispose of any and all property, assets, stocks, bonds and rights of any kind."

It is elementary that in addition to express powers granted by charter to a corporation, it also has such implied powers as are necessary to the execution of the powers expressly granted.

The petition for rehearing points out that the cases

[illegible]

[illegible] or [illegible] to repay the bonds at that price.

Mr. Lewis, the chairman of the board of directors of the defendant manufacturing company, testified that the company had entered funds on hand when it wished to invest for a small time -- usually at about 1pm -- and this was the reason why they were willing to buy the bonds on the sixty-day repurchase agreement. He also testified that the company had paid a number of similar transactions every fall. Plaintiff argues that this evidence is contradictory of and inconsistent with the written evidence and mechanically contradicts it. We do not think so. The finding of the trial court is entitled to the same weight as the verdict of a jury, and we cannot say that its finding in this respect is contrary to the weight of the evidence.

But even if we could find [illegible] to the trial court that the transaction in question was a loan, we do not think it would [illegible] the validity of the arrangement, or that [illegible] v. [illegible], [illegible] v. [illegible] v. [illegible], [illegible] v. [illegible], [illegible] v. [illegible], [illegible] would [illegible] otherwise.

The defendant manufacturing company, the record shows, was incorporated under the General Incorporation Act. By its charter, as amended, it was given authority "to engage in any business manufacturing, mining, construction or transportation business of any kind or character whatsoever, and to that end to acquire, hold, use and dispose of any and all property, assets, shares, bonds and rights of any kind."

It is strongly [illegible] in addition to express powers granted by statute to a corporation, it also has such implied powers as are necessary to the exercise of the powers expressly granted.

The petition for rehearing points out that the order

distinguish between an act ultra vires which is merely an abuse of some corporate power and an act which amounts to an illegal and void assumption of a power which the corporation does not have. This court is not unaware of that distinction nor of the difficulty of applying it in particular cases.

However, even conceding further that this transaction was a loan and therefore ultra vires, we would be disposed to hold that it was only an abuse of corporate power, - not an illegal and void assumption of a power that the corporation did not have at all.

134 - 31264

LOUIS COHEN and ABE TOPPER, Trading as LOUIS COHEN & TOPPER, Defendants in Error,	)
vs.	) ERROR TO MUNICIPAL COURT OF CHICAGO.
ISIDORE GARBER, SAM GARBER and BESSIE GARBER, Plaintiffs in Error.	)

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendants in the trial court seek to reverse a judgment for the sum of $2312.45, entered upon the finding of the court.

The plaintiffs sued upon sixteen promissory and judgment notes, executed and delivered by the defendants to the plaintiffs on May 24, 1922. Judgment by confession having been entered, the defendants made a motion to set it aside, supported by their affidavits, which were substantially similar, setting up the defenses of want of consideration and that the execution and delivery of the notes were obtained through fraud practiced upon them by the plaintiffs. There was a trial upon the merits and judgment as stated.

The evidence tended to show that the plaintiff co-partners were dealers in furs; that defendant Sam Garber was engaged in the business of manufacturing wearing apparel from these furs; that he purchased furs and skins from the plaintiff upon an open account, and that upon petition of plaintiffs and other creditors, he was brought into the bankruptcy court upon a prayer that he should be adjudged a bankrupt; that a composition of his creditors was agreed upon, whereby the creditors accepted notes for twenty-five per cent of their claims, and pursuant to the terms of that composition the plaintiffs accepted the notes of Sam Garber,

Isidore Garber and Bessie Garber, dated February 8, 1922, due in ten months from date, for the sum of $435.31.

Sam Garber is the son of defendants Isidore and Bessie Garber, and they were apparently living together in a home on Lincoln avenue, Chicago, where their business was conducted. Testimony indicates that the defendants are all foreigners by birth; that they speak the Yiddish language; that Bessie Garber at the time of the action had been in this country four years, Isidore thirteen years, and Sam since Christmas, 1913.

Their evidence tends to sustain in all its details the allegations of their several affidavits that on May 24, 1922, when the notes sued on were executed, Ed Topper, one of the plaintiffs, went to the home of the defendants, Sam and Bessie Garber being present, and informed them that there was difficulty in keeping the creditors in the bankruptcy proceedings in line with reference to the composition agreement; that the creditors desired a separate agreement to be signed by defendants; that, if defendants would not sign these separate agreements, the creditors would file a petition to set aside the composition and charge defendant Sam Garber with violation of the Bankruptcy act; that he, Sam Garber, would be indicted and criminally prosecuted; that Topper further said that he would prepare the agreements if they would execute the same; that Topper returned after several days with a number of these papers, which he called agreements, but which were in fact these judgment notes; that the defendants did not know that the same were judgment notes and did not know that they were to be executed in satisfaction of the claim of plaintiffs, and that they executed the notes under the misapprehension that the same were these agreements.

Opposed to this is the evidence of the plaintiffs to the effect that Sam Garber again applied to them for credit in the pur-

Andre Garber and Dorothy Garber, dated February 3, 1932, due in [illegible] from date, for the sum of [illegible].

Sam Garber is the son of defendants Andrew and Dorothy Garber, and they were apparently living together in a home on [illegible] avenue, Chicago, where their business was conducted.

Testimony indicates that the defendants are all foreigners by birth; that they speak the Yiddish language; that Dorothy Garber at the time of the action had been in this country four years, [illegible] three years, and Sam since [illegible], 1911.

Their evidence tends to support in all its details the allegations of their several affidavits dated on May 24, 1932, when the notes sued on were executed. Ed Harper, one of the plaintiffs, went to the home of the defendants, Sam and Dorothy Garber being present, and informed them that there was difficulty in securing the credits in the bankruptcy proceedings in line with reference to the composition agreement; that the creditors desired a separate agreement to be signed by defendants; that, if defendants would not sign such separate agreement, the creditors would file a petition to set aside the composition and charge defendant Sam Garber with violation of the bankruptcy act; that he, Sam Garber, would be indicted and criminally prosecuted; that Harper further said that he could prepare the agreements if they would execute the [illegible]; that Harper returned after several days with a number of blank papers, which he called agreements, but which were in fact blank judgment notes; that the defendants did not know that the papers were judgment notes and did not know that they were to be [illegible] in satisfaction of the claim of plaintiffs, and that they [illegible] the notes under the misapprehension that the papers were [illegible] agreements.

Opposed to this is the evidence of the plaintiffs to the effect that Sam Garber again applied to them for credit in the pro-

chase of goods, and that they refused to give such credit unless the father, mother and son would execute these notes; that the notes were executed and thereafter goods were delivered to the defendants.

There is practically no dispute as to the rules of law applicable. Either the agreement to give credit, or the past debt which had been discharged in bankruptcy, would be a sufficient consideration for the execution and delivery of the new notes, if the same were in fact executed for that reason. The controlling question in the case therefore is whether the finding of the court that the notes were so executed and delivered and that the same were not obtained by fraudulent representations, is against the manifest weight of the evidence.

The task of an Appellate court in reviewing a record where the witnesses who testified are not entirely familiar with the English language, is peculiarly difficult. In such case, the trial court has a more than ordinary advantage in weighing the testimony.

The evidence here is conflicting. It is clear that one or the other group of witnesses does not relate the facts as they are.

The record indicates, however, that the defendant Sam Garber is not wholly deficient in his knowledge of the English language; that he was accustomed in dealing with plaintiffs to execute trade acceptances and notes, and that he evidently understood the character of such instruments. We find it difficult to believe the story of the defendants to the effect that these notes were executed in his presence, they believing that the same were not notes but agreements with reference to the bankruptcy matter, which had apparently been settled several months prior to the execution of the notes. The testimony of the defendants in this

respect is not persuasive.

The uncontradicted fact that on the day after the execution of these notes plaintiffs commenced sending goods to the defendants upon memorandum agreements, tends to corroborate the testimony of the plaintiffs, which is in direct conflict with the testimony of the defendants.

The burden of proof was upon the defendants. The finding of the court is entitled to the same weight in this court as the verdict of a jury would have, and we have no right to set the finding aside unless it is against the manifest preponderance of the evidence. We cannot on this record so find, and the judgment of the trial court is therefore affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

164 - 31295

ELVIRA MOSBY, Appellee, vs. JOHN E. CHRISTENSEN, Doing Business as JOHN E. CHRISTENSEN AGENCY AND LOAN CO., and MARY CATHERINE BARRETT, Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendants appeal from a judgment in the sum of $2020, entered upon the finding of the court.

In her amended statement of claim plaintiff averred that she entered into a contract with the defendant Mary Catherine Barrett for the purchase of certain real estate; that said Barrett held title only in trust, for the use of defendant John E. Christensen, who was the real owner of the premises and who received all the consideration and benefits of the contract; further, that she paid defendants under the contract the total sum of $2030, but that defendants failed to carry out the contract in accordance with its terms; that she therefore demanded the repayment of the sums advanced by her under the contract.

The affidavit of merits admitted the execution of the contract on October 3, 1923, but denied that Mary Catherine Barrett held title to the property in trust for the use and benefit of defendant Christensen, and denied that defendant Christensen was the owner of the premises or that he received the consideration and benefits of the contract or had any interest whatsoever in the property mentioned in the contract.

The trial was by the court, with finding for the plaintiff and judgment against both defendants.

It is apparent from this statement of the case that

proof that John E. Christensen in fact owned the property was necessary in order to entitle the plaintiff to recover against him.

The plaintiff has not appeared in this court to support the judgment, and the defendants assert that there is no proof in the record of this essential fact.

We have examined the abstract, which presumably is correct, and fail to find any such evidence. The finding based on a mere guess cannot stand, and for the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Johnston, J., concur.

393 - 51525

T. L. WEAVER and S. P. WEAVER,
Copartners as WEAVER BROTHERS,
Appellants,

vs.

SEARS-ROEBUCK & CO., a Corporation,
Doing Business as ROSEMARY PINE
LUMBER MILLS,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

244 I.A. 638

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiffs, who appeal, sued for the purchase price of 252,500 feet of pine logs sold, as alleged, to defendant for the price of $1,010.

The affidavit of merits denied that defendant was indebted as alleged; averred that the alleged contract of sale was for standing timber, and therefore, by virtue of the statutes of the State of Louisiana (where the transaction took place) concerning the sale of immovables, null and void, because not in writing.

The issues were submitted to a jury, which returned a verdict for defendant. The motion of plaintiffs for a new trial was over-ruled and there was judgment on the verdict.

It will not be necessary to discuss at length some of the points argued. The plaintiffs complain about the instructions, but as these were given orally and no objection made or exception taken to any of them, plaintiffs are precluded from maintaining that point in this court.

The Louisiana statute concerning the sale of immovables is a statute analogous to our Statute of Frauds. It is not, we think, applicable for the reason that the contract here sued on has been fully executed by the delivery of the timber. Under such a statute to deny the recovery of the purchase price on the ground that the contract was not in writing, would amount to permitting

the statute to be used as an instrument of fraud. This would be equivalent to a license for commercial piracy. Such a statute cannot be thus used.

The controlling question in the case, in our opinion, is whether the verdict and judgment are clearly and manifestly against the weight of the evidence.

The evidence in the record tends to show that prior to January 1, 1919, the MacKinnon Lumber & Pole Company, Ltd., a corporation organized under the laws of the Dominion of Canada, operated a small sawmill at Provencal in the state of Louisana. Defendant, Sears-Roebuck & Company, at the same time doing business under the name of Rosemary Pine Lumber Mills, operated a planing mill and distributing lumber plant at South Mansfield, Louisana, which was about fifty miles east of Provencal. It also operated a sawmill at Grandcane, Louisana, which was about three miles from South Mansfield. Defendant had been doing business in that locality for many years.

In January, 1918, F. A. O'Sullivan became manager of the Rosemary Pine Lumber Mills and continued to act as such manager until December 1, 1919. His predecessor was one Colzman.

The plaintiffs, Weaver Brothers, owned timber lands in various parts of the state and had an office at Shreveport, Louisana; B. P. Weaver was in charge of this office. They had another office at Flora, Louisana, which was about two miles from Provencal; plaintiff T. L. Weaver was in charge of that office.

Prior to January 1, 1919, Weaver Brothers and the Rosemary Pine Lumber Mills dealt with each other and had mutual accounts.

On or about January 1, 1919, the MacKinnon Lumber & Pole Company became financially embarrassed. It owed altogether about $12,000 or $13,000, $7,000 or $8,000 of which was due to defendant, Rosemary Pine Lumber Mills. The defendant Mills had held a first mortgage on the mill and a second mortgage on the teams of the

[illegible] studies to be used as an instrument of fraud. This would be [illegible] equivalent to a license for commercial piracy. Upon a statute [illegible] cannot be thus used.

The controlling question in the case, in our opinion, [illegible] whether the verdict and judgment are clearly and manifestly [illegible] against the weight of the evidence.

The evidence in the record tends to show that prior to [illegible] January 1, 1919, the Mackinnon Lumber & Pole Company, Ltd., a corporation organized under the laws of the Dominion of Canada, operated a small sawmill at Drayton, in the county of Lambton. Defendant, [illegible]-Hodgson & Company, at the same time doing business under the [illegible] of Hagersville Lumber Mills, operated a planing mill and [illegible] distributing lumber plant at South Bend, Indiana, which was [illegible] fifty miles east of Drayton. It also operated a sawmill at [illegible], Louisiana, which was about three miles from South Bend, Indiana. Defendants had been doing business in that locality for many years.

In January, 1919, T. A. O'Sullivan became manager of the Hagersville Lumber Mills and continued to act as such manager until December 1, 1919. His predecessor was one Dalton.

The plaintiffs, Thayer Brothers, owned timber lands in [illegible] parts of the State and had an office at Shreveport, Louisiana; [illegible] P. Thayer was in charge of this office. They had another office at Tyler, Louisiana, which was about two miles from Pineland; plaintiff T. E. Thayer was in charge of that office.

Prior to January 1, 1919, Thayer Brothers and the Hagersville Lumber Mills dealt with each other and had mutual accounts.

On or about January 1, 1919, the Mackinnon Lumber & Pole Company became financially embarrassed. It owed altogether about $[illegible] or $[illegible], $7,000 of which was due to defendants, Hagersville Pine Lumber Mills. The Hagersville Mills held a first mortgage on the mill and a second mortgage on the issues of the

MacKinnon Lumber & Pole Company, securing this indebtedness. Another party held a first mortgage on the teams to secure a claim of $1650.

Under these circumstances, on or about February 3, 1919, the MacKinnon Lumber & Pole Company, by authority of its board of directors, entered into a trust agreement with F. A. O'Sullivan as trustee. The agreement was in writing and recited the ill health of the company's manager and the debts which were due and pressing for payment; that the resources of the company were such that a successful operation of the mill would pay all debts; that a foreclosure would be destructive and detrimental; that O'Sullivan would undertake to operate the mill; appointed him the agent and manager of the business, and turned over and delivered to him all the property and contracts of the MacKinnon Lumber & Pole Company "to operate and manage the same for the benefit of the said company, and to make such payments to the creditors of the said company from the funds arising from the operation after payment of the costs and expenses of operation."

The agreement further recited that the Rosemary Pine Lumber Mills would advance the MacKinnon Lumber & Pole Company $200 in cash; that O'Sullivan undertook the agency, with all the powers of receiver; that he undertook to obtain the consent of all creditors; that all the buildings at the mill were to be turned over to him; that he should render monthly statements to A. W. MacKinnon; that all the property, books, contracts, etc., should be turned over to him; that if O'Sullivan should ascertain that the MacKinnon Lumber & Pole Company mill plant could not be operated at a profit, he might, upon ten days written notice, cancel and release himself from all obligations and take such steps as might be necessary to protect the Rosemary Pine Lumber Mills' indebtedness, either by foreclosure or otherwise.

It is expressly stated that the agreement was dependable upon the consent of the creditors; that it should exist until

the debts were paid off, either by operation of the property as provided, or by payment of the debts of the MacKinnon Company.

The consent of the creditors, of whom plaintiffs were one, seems to have been obtained, and O'Sullivan began the operation of the plant. Plaintiffs owned a tract of timber land of about 440 acres, which was situated nearer to the Provencal mill than was other timber owned by the MacKinnon Lumber & Pole Company, and while O'Sullivan was thus operating the mill he began negotiations with plaintiffs for the purchase and cutting of this timber, and these negotiations resulted in a contract of purchase. The disputed and controlling question of fact in the case is whether O'Sullivan purchased the timber from plaintiffs in behalf of the Rosemary Pine Lumber Mills, as plaintiffs contend he did, or as trustee of the MacKinnon Lumber & Pole Company, as the defendant asserts.

Plaintiff E. P. Weaver testified that in the course of these negotiations he explained to O'Sullivan that plaintiffs could not afford to sell their timber to the MacKinnon Lumber & Pole Company on account of its financial condition, but that they would sell the timber to the Rosemary Pine Lumber Mills; that O'Sullivan so agreed to purchase it, and that defendants therefore permitted him to go ahead and cut the timber, leaving the matter entirely in his hands.

Plaintiff T. L. Weaver also testified that he told O'Sullivan he could not sell the timber to the MacKinnon Lumber & Pole Company on account of their financial condition; that at a later time O'Sullivan came back and told him that he had made arrangements to buy the timber for the account of the Rosemary Pine Lumber Mills; that they agreed to sell him the timber to be paid for as cut, and that O'Sullivan agreed to pay for it at the end of each month; that plaintiffs did not carry the accounts on

the books; that there was nothing to carry on the books until O'Sullivan cut the timber and turned in the amount; that when the witness talked with O'Sullivan about paying plaintiffs for the remainder of the timber, O'Sullivan said he would but that the Rosemary Pine Lumber Mills had an account against Weaver Brothers, which he wanted to get straightened out before he sent a check for the timber.

Another witness, who was the bookkeeper of plaintiff at Flora at the time in question, testified that he was present on the day O'Sullivan came to Flora and made arrangements with Weaver for the timber. This witness says that at the end of the talk with T. L. Weaver he asked O'Sullivan if the Rosemary Pine Lumber Mills was to pay for the timber, to which O'Sullivan replied, "Yes," and that Mr. Weaver told him that would be the only way he would handle the account.

One R. B. Goode testified that he was credit man for the plaintiffs at the time in question and said that he was in the office during the time the matter was discussed; that the deal was made with O'Sullivan as manager of the Rosemary Pine Lumber Mills.

Frank M. Cook testified that he went to Mansfield in the summer and fall of 1920, in company with A. W. MacKinnon; that he went at the request of the Continental Bank & Trust Company of Shreveport, Louisana, to see F. A. O'Sullivan, who was then acting as trustee; that the bank had tentatively agreed to lend MacKinnon money to take up the mortgage indebtedness of the MacKinnon Lumber & Pole Company; that they met O'Sullivan in Mansfield; that O'Sullivan told him that he would not permit the property to be taken out of his hands unless both the mortgage, indebtedness due to the Rosemary Pine Lumber Mills and the timber account of Weaver Brothers were paid, for the reason that the Rosemary Pine Lumber Mills was responsible for this lumber account; that he would either have to be paid, or that Weaver Brothers would have to

the bonds; that there was nothing, in money or the bonds until O'Sullivan
came and the timber and turned in the mortgage; that when the plaintiff
talked with O'Sullivan about paying plaintiff's for the remainder
of the timber, O'Sullivan said he would tell that the Hennessy
Pine Lumber Mills had an account against Weaver Brothers, which he
wanted to get straightened out before he made a check for the
timber.

Another witness, who was the bookkeeper of plaintiff
at Ilwaco at the time in question, testified that he was present
when the day O'Sullivan came to Ilwaco and made arrangements with
Weaver for the timber. This witness says that at the end of the
talk with T. L. Weaver he asked O'Sullivan if the Hennessy Pine
Lumber Mills was to pay for the timber, to which O'Sullivan re-
plied, "Yes," and that Mr. Weaver told him that would be the only
way he would handle the account.

One R. H. Goode testified that he was at his own for
the plaintiff at the time in question and said that he was in the
office during the time the matter was discussed; that the deal was
made with O'Sullivan as manager of the Hennessy Pine Lumber Mills.

Frank R. Cook testified that he went to Bakerfield in
the summer and fall of 1910, in company with A. W. Hamilton; that
he went at the request of the Continental Bank & Trust Company of
Portland, Oregon, to see T. A. O'Sullivan, who was then getting
the transfer; that the bank had tentatively agreed to lend Hamilton
money to take up the mortgage indebtedness of the Hamilton Lumber
& Pole Company; that they saw O'Sullivan in Portland; that O'Sul-
livan said the case to which not actual [illegible] to be taken
out of the bank unless both the mortgage indebtedness due to the
Hennessy Pine Lumber Mills and the timber account of Weaver
Brothers were paid, for the reason that the Hennessy Pine Lumber
Mills was responsible for Mills Lumber accounts; that he would
either have to be paid, or that Weaver Brothers would have to

relieve the Rosemary Pine Lumber Mills of any responsibility.

A. W. MacKinnon testified that F. M. Cline, manager of Sears-Roebuck & Company, had given him to understand that the Weaver Brothers' account would have to be taken care of in cash, and that O'Sullivan had stated to him that Sears-Roebuck & Company was responsible to Weaver Brothers for this timber.

This testimony of MacKinnon was denied by both Cline and O'Sullivan, and Mr. O'Sullivan testified in detail denying the conversations testified to by the two Weavers, by Ernest Lucky and Frank M. Cook.

The plaintiffs undoubtedly produced the larger number of witnesses whose testimony tended to sustain their contention as to the ultimate question of fact, but we have often said that in determining whether a verdict is against the weight of the evidence, it is the duty of this court to weigh the evidence rather than count it.

Plaintiffs contend that it is unreasonable to suppose that they would have sold this lumber to a party who was known to be financially embarrassed. There is something of merit to this contention, but the weight to be given to it is lessened very much when we reflect that the agreement apparently was that the timber would be paid for monthly; that plaintiffs had much reason to believe that the trusteeship of O'Sullivan would remove all financial embarrassment of the MacKinnon Lumber & Pole Company; and as the defendant points out, it is also quite difficult to understand why, under the circumstances and while holding mortgages which would have permitted it to foreclose and take over the whole business, defendant should undertake to assume and incur responsibility for debts which might arise from running the business of the Pole Company. If the defendant wished to go into the business of buying standing timber and sawing it up into lumber, it could have

believe the Monmouth Pine Lumber Mills of any responsibility.

A. V. Hawkinson testified that R. H. Shine, manager of Sears-Roebuck & Company, had given him to understand that the Denver Dry Goods Company would have to be taken care of in cash, and that O'Sullivan had stated to him that Sears-Roebuck & Company was responsible to Denver Dry Goods for this timber.

This testimony of Hawkinson was denied by both Shine and O'Sullivan, and Mr. O'Sullivan testified in detail denying the conversations testified to by the two witnesses, by Vernon Lundy and Frank W. Beck.

The plaintiffs unfortunately produced the larger number of witnesses whose testimony tended to sustain their contention as to the ultimate question of fact, but we have often said that in determining whether a verdict is against the weight of the evidence, it is the duty of this court to weigh the evidence rather than count it.

Plaintiffs contend that it is unreasonable to suppose that they would have sold this timber to a party who was known to be financially embarrassed. There is something of merit in this contention, but the weight to be given to it is lessened very much when we realize that the government appraisal was that the timber would be paid for monthly; that plaintiffs had much reason to believe that the irresponsibility of O'Sullivan would remove all financial embarrassment of the Monmouth Lumber & Pole Company; and as the defendant points out, it is also quite difficult to understand why, under the circumstances and while holding mortgages which would have prevented it from disposing and then over the white objections, defendant should volunteer to assume and incur responsibility for debts which did not arise from running the business of the Pole Company. If the defendant wished to go into the business of selling finished timber and making it up into lumber, it could have

foreclosed its chattel mortgages and done so.

As a matter of fact, the Rosemary Pine Lumber Mills went out of business, and O'Sullivan ceased to be its manager on December 1, 1919. The timber, for the price of which the plaintiffs sue, was cut after that time, and it is difficult to understand why defendant would continue to purchase timber for delivery to the Pole company after it had in fact ceased to do business in their territory.

The controlling evidence in the case is documentary. The contract under which O'Sullivan took over the Pole company business is between O'Sullivan and the Pole company, and defendant is not a party to it, nor is there anything in it from which it might be inferred that the defendant was to assume an obligation of this kind. From the time that O'Sullivan took control of the MacKinnon mill in March, 1919, it appears that the transactions were carried on in the name of the MacKinnon Lumber & Pole Company. Statements of account were made out in the name of the MacKinnon company, letters written to plaintiffs concerning the transaction were signed in the name of the MacKinnon Lumber & Pole Company, and the checks by which payments were made were also executed in the name of the MacKinnon Lumber & Pole Company, Ltd., by O'Sullivan. Recollections of witnesses (most of them much interested) as to oral conversations (which are denied) can have little weight as against the written documents which show the usual course of business extending over many months.

The claim that defendant was liable in this transaction seems to have been made only after O'Sullivan went into bankruptcy in March, 1921.

The burden of proof was upon the plaintiffs to establish their case by a preponderance of the evidence. The question which this court must decide is whether we can say, over-ruling the

verdict of the jury and the judgment entered by the trial court, that the jury and judge were clearly and manifestly wrong. While the question of fact is not entirely free from difficulty, it seems clear to us, upon a consideration of the evidence, that we cannot so hold, even assuming as a fact (which is not altogether clear) that O'Sullivan had authority to bind the defendant with respect to a purchase of this kind.

Complaint is also made as to the rulings of the trial court in the admission and rejection of evidence. As bearing on the question of O'Sullivan's authority to bind defendant, he testified that he had never made purchases of this kind in defendant's behalf. He was asked on cross-examination whether his predecessor, Coleman, had not done so, and an objection was sustained. We think the ruling was proper, because the question called for an answer that was neither material to the issues nor proper on cross-examination.

An employee of defendant, who testified in rebuttal, stated that he had discussed the payment of this account with O'Sullivan on several occasions, contradicting O'Sullivan's testimony in that respect. He was then asked, "What did he tell you?" and an objection by defendant, on the ground that the same was not proper on rebuttal, was sustained. The ruling was, we think, correct.

It is argued that the court erred in striking out all evidence of plaintiffs as to a check for $147.25, - plaintiffs' exhibit 3. It appeared from the testimony that this check was given for a matter wholly unconnected with the subject matter of the suit. Its admission to the record could only have tended to confuse.

It is also objected that the court allowed O'Sullivan to state that the plaintiffs were named in this schedule in bankruptcy as one of his creditors. It is argued that the schedule itself was the best evidence. The evidence was, we think, properly

verdict of the jury and the judgment entered by the trial court, that the jury and judge were clearly and manifestly wrong. While the question of fact is not entirely free from difficulty, it seems clear to us, upon a consideration of the evidence, that we cannot say, even assuming as a fact (which is not altogether clear) that O'Sullivan had authority to bind the defendant with respect to a purchase of this kind.

Complaint is also made as to the judge of the trial court in the admission and rejection of evidence. As bearing on the question of O'Sullivan's authority to bind defendant, he testified that he had never made purchases of this kind in defendant's behalf. He was asked on cross-examination whether his predecessor, Ward, had done so, and an objection was sustained. We think the ruling was proper, because the question called for an answer that was neither material to the issues nor proper on cross-examination.

As employee of defendant, who testified in rebuttal, he stated that he had discussed the payment of this account with O'Sullivan on several occasions, contradicting O'Sullivan's testimony in that respect. He was then asked, "What did he tell you?" and an objection by defendant, on the ground that the same was not proper on rebuttal, was sustained. The ruling was, we think, correct.

It is argued that the court erred in striking out all testimony of plaintiff's as to a check for $147.50, - plaintiff's exhibit 3. It appeared from the testimony that this check was given for a writer wholly unconnected with the subject matter of the suit. The objection to the record could only have tended to confuse.

It is also objected that the court allowed O'Sullivan to state that the plaintiffs were named in this schedule in consequence of one of his orders. It is argued that the schedule itself was the best evidence. The evidence was, we think, properly

admitted. There is no reversible error in the record and the judgment is therefore affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

449 - 31581

INTER-STATE UNIVERSITY OF SCIENCE, a corporation, Appellee,	APPEAL FROM MUNICIPAL
v.	COURT OF CHICAGO.
E. BLUMENTHAL and E. G. TROWBRIDGE, Appellants.	

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendants appeal from a judgment against them for the amount of a promissory note. The judgment was entered on the verdict of a jury, which was directed by the court after certain evidence offered by defendants, tending to show that the delivery of the note was conditional only, had been excluded.

The errors assigned and argued are the exclusion of this evidence and the direction to the jury to return a verdict for the plaintiff. Plaintiff, however, has not appeared in this court to support the judgment.

The plaintiff, upon the trial, offered in evidence a note for the sum of $866.61, made by defendants to the order of Otto Rabe, endorsed by Otto Rabe, Inter-State University of Science, W. H. Jerrett, and rested.

One of the defendants testified that the note was executed upon March 22, 1926; that Otto Rabe was present at the time it was executed, but the court excluded the evidence of this witness as to what was said at the time of the execution of the note by himself and by Mr. Rabe. The defendant offered to prove by this witness that defendants were beneficial

[illegible] - 31281

[illegible]TER-STATE UNIVERSITY OF [illegible]ILLINOIS, a corporation,
Appellee.

v.

[illegible] BLUMENTHAL and [illegible] E. TROWBRIDGE,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

[illegible]. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendants appeal from a judgment against them [illegible] the amount of a promissory note. The judgment was entered [illegible] the verdict of a jury, which was directed by the court [illegible] certain evidence offered by defendants, tending to show [illegible] the delivery of the note was conditional only, had been [illegible]ended.

The errors assigned and urged are the sufficiency of [illegible] evidence and the direction to the jury to return a verdict [illegible] the plaintiff. Plaintiff, however, has not appeared in this [illegible] to support the judgment.

The plaintiff, upon the trial, offered in evidence [illegible] note for the sum of $[illegible], made by defendants to the order [illegible] Otto Hahn, endorsed by Otto Hahn, Inter-State University of [illegible], W. K. Jarrett, and tendered.

One of the defendants testified that the note was [illegible]ed upon March 22, 1926; that Otto Hahn was present [illegible] the time it was executed, but the court excluded the evi- [illegible] of this witness as to what was said at the time of the [illegible] of the note by himself and by Mr. Hahn. The defendant [illegible] to prove by this witness that defendants were benefited

shareholders in a common law trust, known as the O. B. Carrier Company, which was engaged in the business of manufacturing over-bumper carriers; that on the date of the note, defendants applied to Otto Rabe, the payee of the note, who was in the business of making patterns for use in the manufacture of malleable castings, to have patterns made according to certain requirements of Peoria Malleable Casting Company; that certain drawings and sketches had been made by the superintendent of the Casting Company, which sketches were offered in evidence for identification; that these patterns were to be manufactured on the approval of the superintendent of the Casting Company; that the patterns were not to be paid for at the time but a note was executed by the defendants whereby they promised to pay the plaintiff the amount of the note (introduced in evidence by the plaintiff) which was the proximate cost of the patterns to be manufactured by Mr. Rabe on behalf of defendants; that there was a conversation at the time of the execution of the note between Mr. Rabe and one of the defendants, in which it was agreed that the note should be delivered as collateral security for the patterns which were to be manufactured by Rabe, who was named as payee of the note; that at that time and before the execution of the note, it was agreed that the note was delivered merely as collateral security and was not to become effective and binding until the patterns had been made by the payee of the note, as had been indicated by the patterns and the drawings and according to the specifications; that the note was not to be valid and enforceable unless and until the patterns so made complied with the drawings and specifications;

[illegible]ardshiders in a common law trust, known as the O. K. Garter
[illegible]mpany, which was engaged in the business of manufacturing
[illegible]ter-bumper carriers; that on the date of the note, defendants
[illegible]plied to Otto Hahn, the payee of the note, who was in the
[illegible]siness of making patterns for use in the manufacture of
[illegible]illiards-matching, to have patterns made according to certain
[illegible]quirements of Peerless Billiards Cueing Company; that certain
[illegible]wings and sketches had been made by the superintendents of the
[illegible]ing Company, which sketches were offered in evidence for
[illegible]dentification; that these patterns were to be manufactured on
[illegible]e approval of the superintendent of the Cueing Company; that
[illegible]e patterns were not to be paid for at the time but a note was
[illegible]ecuted by the defendants whereby they promised to pay the
[illegible]initiff the amount of the note (introduced in evidence by the
[illegible]aintiff) which was the reasonable cost of the patterns to be
[illegible]anufactured by Mr. Hahn on behalf of defendants; that there
[illegible]s a conversation at the time of the execution of the note
[illegible]tween Mr. Hahn and one of the defendants, in which it was
[illegible]greed that the note should be delivered as collateral security
[illegible]r the patterns which were to be manufactured by Hahn, who
[illegible]s based on payee of the note; that at that time and before
[illegible]e execution of the note, it was agreed that the note was
[illegible]livered solely as collateral security and was not to become
[illegible]fective and binding until the patterns had been made by the
[illegible]yee of the note, as had been indicated by the patterns and
[illegible]e drawings and sketching to the specifications; that the note
[illegible]s not to be valid and enforceable unless and until the
[illegible]terns so made complied with the drawings and specifications

that these patterns were never furnished in compliance with the drawings or so as to meet the specifications; that as a matter of fact, the superintendent of the Casting Company disproved the patterns and delivery was not made of the patterns as per the sketches; that the delivery of the patterns was not made within a reasonable time after the payee, Rabe, had agreed to make delivery, and that the payee, Rabe, further agreed that at the time of the delivery of the note the note would not become valid and enforceable unless the patterns were delivered within a reasonable time, and that the note was delivered on these conditions.

This offered evidence was excluded and the jury instructed to bring in a verdict for the full amount of the note with interest.

Section 59 of the Negotiable Instruments Law, (Cahill's Stat., chap. 98, par. 79) provides:

> "Every holder is deemed prima facie to be a holder in due course, but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course; but the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of the defective title."

Section 55, chap. 98, par. 75, Cahill's Stat., provides:

> "The title of a person who negotiates an instrument is defective within the meaning of this Act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

In the absence of a brief by the plaintiff, it will be unnecessary to discuss the question involved at length. It is apparent that if the offered evidence had been received it would have tended to show that the note had been negotiated in breach of faith and under such circumstances as would amount to a fraud. This proof would have overcome the prima facie presumption that plaintiff was a holder in due course and made it necessary for plaintiff to prove to the satisfaction of the jury that it had acquired title to the note as a holder in due course. Bell v. McDonald, 308 Ill. 329; Kilcoin v. Ortell, 302 Ill. 531; Straus v. Citizen's State Bank, 254 Ill. 185; Justice v. Stonecipher, 267 Ill. 448; Schintz v. American Trust & Savings Bank, 152 Ill. App. 76; Lutz v. Matheny, 208 Ill. App. 40; Peru State Bank v. Waggett, 230 Ill. App. 522.

For the error of the court in excluding this evidence, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Johnston, J., concur.

In the absence of a brief by the plaintiff, it will be unnecessary to discuss the question involved at length. It is apparent that if the offered evidence had been received it would have tended to show that the note had been negotiated in breach of faith and under such circumstances as would constitute a fraud. This proof would have overcome the prima facie presumption that plaintiff was a holder in due course and made it necessary for plaintiff to prove to the satisfaction of the jury that it had acquired title to the note as a holder in due course. Hall v. Bowman, 4 Ala. App. 317; Ellerbe v. Bryant, 5 Ala. App. 317; Ferrum v. Citizens' State Bank, 204 Ala. 188; Ritter v. Thompson, 207 Ala. 144; Jenkins v. Merchants and Planters Bank, 180 Ala. App. 74; Lewis v. Mobley, 14 Ala. App. 49; Ferg State Bank v. Tannehill, 180 Ala. App. 222.

Nor the error of the court in excluding this evidence, the judgment is reversed and the cause remanded.

Reversed and Remanded.

Gardner, J., and Simpson, J., concur.

18½ - 31080

MARY B. EICHIN, Administratrix of the Estate of Charles Eichin, Deceased, Complainant and Appellee, vs. JOHN F. EICHIN, FRED C. EICHIN and GODLIP A. BURESH, Defendants. On Appeal by FRED C. EICHIN and GODLIP A. BURESH, Appellants.	244 I.A.E.3 APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This appeal by two of the defendants from a decree of the Superior court of Cook county, entered November 5, 1925, has been consolidated for hearing with a writ of error cause, No. 31217, sued out by all three defendants to reverse said decree.

For the reasons stated in our opinion this day filed in said writ of error cause, No. 31217, the decree of the Superior court is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

37 - 31149

ALVINA GERCKE, Plaintiff in Error, v. WILLIAM GERCKE, Defendant in Error.	ERROR TO SUPERIOR COURT, COOK COUNTY.

244 I.A. 638

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error Alvina Gercke seeks to reverse certain portions of a decree of the Superior Court of Cook County, affecting the property rights of the parties, entered in a divorce proceeding on February 18, 1926. The divorce granted to her from her husband, William Gercke, is not here questioned.

Among the errors assigned by her and argued by her counsel are (a) that the trial court "erred in entering the decree regarding her property rights," and (b) that "the decree determining the property rights of the parties is contrary to law and equity." It appears from the pleadings and the evidence that when she filed her bill (December 6, 1923), followed by defendant filing a cross-bill, the parties owned in joint tenancy two pieces of improved real estate in Chicago, which at the time of the marriage (January 18, 1917) were owned by William Gercke alone, - one at No. 3104 Francisco avenue and the other at No. 3753 N. Albany avenue. The court found inter alia that said two pieces rightfully belonged to William Gercke and decreed that the title thereto "be and the same is hereby vested solely and absolutely" in him, free and clear of any claim or lien whatsoever, and that "Alvina Gercke execute such

deed or deeds of re-conveyance, as shall re-invest the title to said premises solely in William Gercke, within five days of the entry hereof, and upon her failure so to do, that said master in chancery, * * make such necessary deed or deeds of said premises" in her name, as shall effectuate and complete the title thereto, in fee simple, solely in him.

In view of the pleadings, the decree and the assignments of error, we are of the opinion that this appellate court is without jurisdiction to hear and fully determine the present writ of error cause, because a freehold is directly involved, and that it must be transferred to the Supreme Court under section 102 of the Practice Act. (Prouty v. Moss, 188 Ill. 84, 85; McComb v. McComb, 238 id. 555, 556; Robnett v. Miller, 303 id. 515, 518; Lewis v. Lewis, 316 id. 447, 449.) In the Lewis case it is decided that a freehold is involved in a decree of divorce, which provides that, in settling property rights, one of the parties convey to the other all her interest in property held by them in joint tenancy. This is the effect of a portion of the decree in question. And the fact that there are other questions involved in the present writ of error cause besides that of a freehold, as to which other questions if they stood alone on the record this court might properly exercise appellate jurisdiction, does not warrant this court in deciding the entire cause upon its merits. (Marvin v. Collins, 7 Ill. App. 353, 354; McFarland v. McFarland, 72 id. 425, 426; Kowalczyk v. Swift & Co., 317 Ill. 312, 322.) So far, however, as the decree purports to affect certain property rights of Frank Spalding (a son of Alvina Gercke by a former marriage), who has sued out a separate writ of error to reverse portions of the decree upon the sole ground that he was not made a party to the

litigation, we think we may take jurisdiction to declare (as we have so declared in an opinion this day filed, Case No. 31150) that said portions of the decree as affect his property rights are void for want of jurisdiction.

The present writ of error cause will be transferred to the Supreme Court.

CAUSE TRANSFERRED TO THE SUPREME COURT.

Fitch and Barnes, JJ., concur.

38 - 31150

FRANK SPALDING,
Plaintiff in Error,

v.

WILLIAM GERCKE and
ALVINA GERCKE,
Defendants in Error.

ERROR TO SUPERIOR COURT,
COOK COUNTY.

244 I.A. 638

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error Frank Spalding seeks to reverse portions of a decree of the Superior court of Cook County, entered in a divorce proceeding on February 18, 1926, wherein Alvina Gercke was complainant and William Gercke was defendant, and wherein William filed a cross-bill seeking affirmative relief in the settlement of his property rights.

It appears that Spalding, of legal age, is the son of Alvina by a former marriage; that prior to the filing of her bill for divorce against William (December 6, 1923), she and William had conveyed by warranty deed to Spalding a certain piece of improved real estate in Chicago, known as No. 2948 Fletcher street; and that at the date of the entry of said decree Spalding had the legal title thereto. Spalding was not made a party to the cross-bill of William Gercke and did not appear as a party in the litigation.

By the decree Alvina was granted a divorce from William because of his cruelty. As to their property rights the court found, inter alia, that the parties were married on January 18, 1917, and continued to cohabit together until about December 1, 1923; that at the time of the marriage William

was the owner in fee simple of two improved pieces of Chicago real estate, one known as No. 3104 Francisco Avenue and the other as No. 3753 N. Albany avenue, and Alvina was the owner in fee simple of a third improved piece of Chicago real estate, known as 2951 N. Oakley avenue, which "was subsequently traded" for the No. 2948 Fletcher street property; that William and Alvina agreed that the three pieces of real estate should be put in their joint names, as joint tenants and not as tenants in common, "which was done accordingly;" that at the time of the marriage William also owned about 20 acres of land in the state of Michigan, and shortly thereafter he desired to deed the same to his son by a former marriage, and Alvina joined with him in executing such a deed to said son; that Alvina "protested" against her executing such deed unless William would sign a contract providing that said Fletcher street property should at Alvina's death (in case she died before William) be conveyed in joint tenancy to her son, Frank Spalding, and her husband, William, and that William "agreed to such condition;" that William cannot readily understand and does not speak the English language; and that William, in subsequent negotiations had with a real estate agent for the apparent purpose of putting such agreement in writing, joined with Alvina in signing and delivering a warranty deed (not recorded until just before Alvina and William separated, December 1, 1923) of said Fletcher street property, conveying the same absolutely to said Frank Spalding, - William at the time believing that the papers which he signed were in accord with said agreement; that Alvina, after the execution of said deed and until about December 1,

[illegible] the owner in fee simple of two improved places of Chicago
[illegible] real estate, one known as No. 3104 Prairie avenue and the
[illegible] other as No. 3108 N. Albany avenue, and Irving was the owner
[illegible] two simple of a third improved place of Chicago real estate,
[illegible] known as 3021 N. Oakley avenue, which "was subsequently traded"
[illegible] by the No. 1924 Fletcher street property; that William and
[illegible] Irving agreed that the three places of real estate should be
[illegible] in their joint names, as joint tenants and not as tenants
[illegible] common, "which was done accordingly;" that at the time of
[illegible] marriage William also owned about 20 acres of land in the
[illegible] state of Michigan, and shortly thereafter he deeded to deed
[illegible] same to him son by a former marriage, and Irving joined
[illegible] with him in executing such a deed to said son; that Irving
[illegible] "understood, against her expressing such deed unless William would
[illegible] a contract providing that said Fletcher street property
[illegible] should at Irving's death (in case she died before William) be
[illegible] conveyed in joint tenancy to her son, Frank Spalding, and her
[illegible] husband, William, and that William "agreed to such consideration;"
[illegible] that William cannot readily understand and does not speak the
[illegible] English language; and that William, in subsequent negotiations
[illegible] with a real estate agent for the apparent purpose of putting
[illegible] agreement in writing, joined with Irving in signing and
[illegible] delivering a warranty deed (not recorded until just before
[illegible] Irving and William separated, December 1, 1923) of said Fletcher
[illegible] street property, conveying the same absolutely to said Frank
[illegible] Spalding. - William at the time believing that the papers which
[illegible] signed were in accord with said agreement; that Irving,
[illegible] after the execution of said deed and until about December 1,

1923, collected all rents on said Fletcher street property and signed all rent receipts in her own name, and that, during the year 1920, an existing loan on said property was extended in the names of Alvina and William, and not in Spalding's name; and that for several years prior to their separation William and Alvina kept accounts in two Chicago banks in their joint names, and shortly prior to the separation the moneys in these accounts aggregated about $1800, all of which Alvina drew out for her own use and benefit about December 1, 1923.

The court decreed in substance that the Francisco avenue and N. Albany avenue properties "be vested solely and absolutely" in William Gercke and that Alvina Gercke "execute such deed or deeds of re-conveyance as shall re-invest the title to said premises" solely in William Gercke within five days, etc.; that Alvina pay to William $1800, so withdrawn from said banks, less $200 for her reasonable solicitor's fees; and that William "have a lien for the balance thereof upon the premises known as 2948 Fletcher street," Chicago, "title to which is held by said son of Alvina Gercke for her use and benefit" and that "execution issue therefor," and that Alvina pay the costs, etc.

The only errors assigned by Frank Spalding and argued by his counsel are in substance that the court erred (1) in decreeing that for the amounts decreed to be paid to William the latter should have a lien upon the Fletcher street property and (2) in entering such a decree, where it appears that Spalding "was not a party to said suit either under the bill or cross-bill."

Inasmuch as the present record discloses that Spalding holds the legal title to said Fletcher street property

and presumably has some interest therein, and as he was not made a party to the cross-bill or to the litigation, we are of the opinion that he had such an interest in the proceedings and decree as warranted him in suing out the present writ of error; (Anderson v. Steger, 173 Ill. 112, 117; People v. O'Connell, 252 Ill. 304, 308; People v. Harrigan, 294 Ill. 171, 173); and that the Superior court was without jurisdiction to enter any decree which gives to William Gercke a lien for any amount upon Spalding's Fletcher street property, and that those portions of the decree as affect Spalding's rights in said property (whatever they may be) are void. He should have been made a party to the proceedings and been given an opportunity to defend. (Van Vleet v. DeWitt, 200 Ill. 153, 155.) It is a rule in equity that all persons who have any substantial legal or beneficial interest in the subject matter in litigation and who will be materially affected by the decree must be made parties. (Riley v. Webb, 272 Ill. 537, 538.) And the objection that there is a lack of proper parties may be taken at the hearing or in a court of review on appeal or on error. (Knopf v. Chicago Real Estate Board, 173 Ill. 196, 201; Larson v. Glos, 235 Ill. 584, 588.)

Accordingly, all portions of the decree that purport to affect any, right, title or interest which Frank Spalding may have in said Fletcher street property, and to create any lien thereon in favor of William Gercke, is reversed.

DECREE REVERSED AS TO THE PORTIONS MENTIONED.

Fitch and Barnes, JJ., concur.

117 - 31246

ORA M. MILNER, Plaintiff in Error, v. YELLOW CAB COMPANY, a corporation, Defendant in Error.	ERROR TO SUPERIOR COURT, COOK COUNTY.

244 I.A. 539

MR. PRESIDING JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

In an action for damages for personal injuries received by plaintiff in a collision of two taxicabs on one of the drives in Lincoln Park, Chicago, on the afternoon of July 11, 1925, the court, at the close of all the evidence, instructed the jury to find the Yellow Cab Company not guilty. They returned such verdict and, after plaintiff's motions for a new trial and in arrest of judgment had been overruled, the court entered judgment against her for costs, which she seeks by this writ of error to reverse.

The action was commenced against the Cab Company and George J. Rogers, the owner and driver of the so-called "brown" cab, in which plaintiff was a passenger at the time of the accident. At the end of the trial plaintiff dismissed the suit as to Rogers. Her original declaration consisted of two counts, to which the Yellow Cab Co. pleaded the general issue. The first charged defendants with negligence generally in the operation of their respective cabs and that as a result of the collision plaintiff, while in the exercise of due care, etc., was seriously and permanently injured. The second charged the Yellow Cab Co. with negligence in driving its cab at a speed in excess of 15 miles an hour in a residence portion of the city, contrary to the statute, and both defendants with other negligence. To these counts the Yellow Cab Co. filed a plea of the general issue.

Before the trial plaintiff filed an additional count charging both defendants with willful and wanton negligence and it was ordered that said plea of the Yellow Cab Co. stand as a plea thereto.

In addition to witnesses as to the character and extent of plaintiff's injuries, she called five witnesses, all of whom testified as to the details of the accident. She also testified concerning the same, as did George J. Rogers, the driver of the brown cab, who was called by the court. When plaintiff had rested, the court, on motion of the Yellow Cab Co. and over her objection, instructed the jury that she could not recover from it under the additional count and that they must disregard said count as to it. Thereupon the Cab Company moved the court to instruct the jury to find it not guilty as to the remaining counts, and, as stated in the bill of exceptions, "the court reserved the decision of the motion and for the time being refused to give said instruction to the jury and marked it 'refused'." Thereupon the Cab Company offered its evidence and two witnesses testified in its behalf, viz, the chauffeur of the Yellow Cab, Jacob Schick, and another chauffeur employed by it, who happened to be in the vicinity at the time of the collision. At the close of all the evidence the Cab Company renewed its motion for a directed verdict in its favor, and, over plaintiff's objection, the court gave the requested instruction and the jury returned a verdict accordingly.

The testimony of plaintiff's witnesses, and that of Rogers, disclosed in substance the following: On the afternoon of July 11, 1925, plaintiff and the witness, Ida Servias, after their arrival at the Grand Trunk railway station in Chicago from a vacation trip, hired the brown cab to take them to plaintiff's home at 4446 Sheridan road. On the way they travelled north through Lincoln Park. It was raining and the streets were slippery. The accident happened just south of Belmont avenue,

an east and west street, in the outer or "extension" drive of the park. There is an inner and an outer drive, and the two drives, running northerly, come towards each other, and at Belmont avenue they are but a short distance apart. Belmont avenue connects the two and just north of it is the triangle in which the Sheridan monument stands. The brown cab was moving north at a speed of about 12 miles an hour, on the east side of the outer drive, "about two feet from the grass." The pavement, about 60 feet wide, was very slippery. On the opposite side of the drive, and moving in a procession southerly, near the west edge, were three automobiles - one, a sedan, driven by a woman, - another, a Buick touring car about 45 feet behind the sedan, driven by plaintiff's witness, Hardin, - and the third the yellow cab about 100 feet behind the Buick car. The sedan and Buick cars were travelling at a speed of from 15 to 20 miles an hour. The driver of the sedan car for some reason suddenly checked its speed and it skidded towards the east and, passing the brown cab, came to a stop. Its sudden checking and skidding caused Hardin to suddenly check the speed of his Buick car and it also skidded towards the brown cab, hit it but did no damage to it, and came to a stop. By this time the br own cab had stopped and it stood on the east side of the drive, near the east edge, facing north. Then the yellow cab, which had been moving without chains at a speed of about 35 miles an hour, skidded, crossed the drive at an angle of about 45 degrees, whirled, collided with the brown cab, drove it back a little, and came to a stop partly in the drive and partly on the grass to the east. The force of the collision was such that one of the wheels of the brown cab was knocked off, one of its axles broken and its radiator jammed against the motor, etc. Plaintiff was thrown forward and downward. Her head struck the glass partition in front of her, breaking

it and causing severe gashes in her head, and her right knee and left leg were injured severely. She was confined in a hospital for about nine weeks.

In view of the testimony introduced by plaintiff we are of the opinion that the court erred in directing the jury to return a verdict in favor of the Cab Company on the issues presented by the two original counts and the plea thereto, and in entering the judgment in its favor upon said directed verdict. Plaintiff's evidence tended to show that, under the circumstances at and before the time of the collision, the driver of the yellow cab was negligent in not having his automobile under proper control and in propelling it over a slippery street without chains at an excessive rate of speed, and that such negligence on his part was the proximate cause of the collision and plaintiff's resulting injuries. And because of the somewhat conflicting testimony of defendant's two witnesses, the questions, whether the driver of the yellow cab was guilty of negligence as charged and whether that negligence was the proximate cause of the collision and plaintiff's injuries, were for the jury and not for the court to determine. In Libby, McNeill & Libby v. Cook, 222 Ill. 206, 212, it is said: "In passing upon a motion for a peremptory instruction the question of the preponderance of the evidence does not arise at all. Evidently fairly tending to prove the cause of action set out in the declaration may be the testimony of one witness only, and he may be directly contradicted by twenty witnesses of equal or greater credibility; still the motion must be denied, * * .

When a motion for a peremptory instruction is made by the defendant, * * if the court is of the opinion that there is evidence in the record which, standing alone, is sufficient

and causing severe gashes in her head, and her right knee
and left leg were injured severely. She was confined in a
hospital for about nine weeks.

In view of the testimony introduced by plaintiff on
of the opinion that the court erred in directing the jury
return a verdict in favor of the Gas Company on the issues
tendered by the two original counts and the plea thereto, and
sustaining the judgment in its favor upon said directed ver-
dict. Plaintiff's evidence tended to show that, under the
circumstances at and before the time of the collision, the
driver of the police cab was negligent in not having his auto-
mobile under proper control and in propelling it over a slippery
street without chains at an excessive rate of speed, and that
such negligence on his part was the proximate cause of the
collision and plaintiff's resulting injuries, and because of
the conflict conflicting testimony of defendant's one witnesses,
the questions, whether the driver of the police cab was guilty
of negligence as charged and whether that negligence was the
proximate cause of the collision and plaintiff's injuries, were
for the jury and not for the court to determine. In Illinois
Malleff v. Libby v. Owen, 228 Ill. 308, 313, it is said: "In
ruling upon a motion for a peremptory instruction the question
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Obviously fairly conceding, as true, the truth of evidence and not
the contradiction may be the testimony of one witness only,
and he may be directly contradicted by twenty witnesses of equal
or greater credibility, still the motion must be denied." "
When a motion for a peremptory instruction is made
by the defendant, " " if the court is of the opinion that there
is evidence in the record which, resulting alone, is sufficient

to sustain such a verdict (for plaintiff), but that such a verdict, if returned, must be set aside because against the manifest weight of all the evidence, then the motion should be denied. * * To hold otherwise is to deny to plaintiff the right of trial by jury." (See, also, Shannon v. Nightingale, 321 Ill. 168, 176.)

And we are also of the opinion that the court erred, at the close of plaintiff's evidence and on defendant's motion, in instructing the jury to disregard the additional count of the declaration, charging defendant with willful and wanton negligence. We think that plaintiff's evidence tended to show such a reckless disregard of consequences and of the safety of others on the street at the time, on the part of the driver of the yellow cab, as warranted the submission to the jury of the question whether he was guilty of willful and wanton negligence as charged in said count. In Walldren Express Co. v. Krug, 291 Ill. 472, 476, it is said: "Whether the negligent conduct of a defendant which has resulted in injury to another amounted to wantonness is a question of fact to be determined by the jury, if there is any evidence in the record fairly tending to show such a gross want of care as indicates a willful disregard of consequences or a willingness to inflict injury. * * An intentional disregard of a known duty necessary to the safety of the person or property of another and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences, make a case of constructive or legal willfulness such as charges the person whose duty it was to exercise care with the consequences of a willful injury." (See, also Brown v. Illinois Terminal Co., 319 Ill. 326, 330; Jones v. Kramer, 235 Ill. pp. 362, 368.)

For the reasons indicated the judgment of the Superior court against plaintiff for costs is reversed and the cause is remanded.

REVERSED AND REMANDED.

Fitch and Barnes, JJ., concur.

72 - 31196

MICHOLINA STOLOWSKI, (Complainant), Appellee, v. JOSEPH WIERZBOWSKI et al., (Defendants), On appeal of JOSEPH WIERZBOWSKI and MARTIN WIERZBOWSKI, Appellants.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a bill to remove as clouds upon complainant's title to real estate known as 2036 Stave street, Chicago, an instrument called a trust deed, or a trust deed note, executed by defendants Jan and Katie Czaplewski to defendant Joseph Wierzbowski, a judgment by confession entered thereon by said Wierzbowski, an affidavit by him filed of record claiming an equitable interest in said premises, and a judgment by confession obtained by defendant Martin Wierzbowski.

From a decree for complainant the two Wierzbowskis have appealed. A decree pro confesso was entered against the other defendants Jan and Katie Czaplewski and Dennis J. Egan, bailiff of the Municipal court of Chicago.

December 21, 1922, complainant entered into a written contract of exchange with the Czaplewskis through defendant Joseph Wierzbowski, a real estate broker, to convey to the Czaplewskis the premises known as 2338 North Seeley avenue, Chicago, subject to a mortgage for $800, in exchange for which the Czaplewskis were to convey to complainant the aforesaid premises known as 2036 Stave street, subject to three mortgages

aggregating $3600. In the exchange the Czaplewskis were also to give complainant a second mortgage for $1000 on the Seeley avenue property. Each of the parties was to pay Joseph Wierzbowski brokerage fees and commissions.

At the time of executing the contract for such exchange the title to the Stave street property stood in one Tabor, who was to convey the same to the Czaplewskis. The titles were brought down and the parties met on February 6, 1923, to close the deal. It appears that Tabor would not convey to the Czaplewskis without an adjustment of the encumbrances on the Stave street property, and a cash advancement, and that to obtain the conveyance Joseph Wierzbowski had effected negotiations in the meantime whereby the prior encumbrances were to be replaced by a mortgage of $2500, and by a cash payment of $1049.75, and an amount to cover expenses incidental to the deal. The mortgage for $2500 had been placed of record, and the Czaplewskis not having the cash for such purposes it was advanced by Joseph Wierzbowski, and it was understood that as security therefor they were to give him a mortgage on the Seeley avenue property when the exchange was effected. To that end the attorney for the Czaplewskis on that occasion prepared such a mortgage, and at the same time a deed of the Seeley avenue property to the Czaplewskis.

There was some evidence that these arrangements with Tabor were made at the request and for the benefit of both parties to the contract of exchange, and it is upon such a theory that Joseph Wierzbowski sought later to charge the properties of both parties with a lien for such advancement. But there is no evidence tending to show any assumption of

approximately $2000. In the exchange the Czaplowskis were also to give complainant a second mortgage for $1000 on the lately owned property. Each of the parties was to pay Joseph Jarzebowski brokerage fees and commissions.

At the time of executing the contract for such exchange the title to the three street property stood in one Fisher, who was to convey the same to the Czaplowskis. The papers were brought down and the parties met on February 6, 1923, to close the deal. It appears that Fisher would not convey to the Czaplowskis without an adjustment of the commission among the three street property, and a cash advancement, and that to obtain the conveyance Joseph Jarzebowski had offered negotiations in the meantime whereby the prior encumbrances were to be replaced by a mortgage of $2500, and by a cash payment of $1042.72, and he wanted to avoid explaining individual to the deal. The mortgage for $1000 had been placed of record, and the complainants, not having the cash for such purpose, it was arranged by Joseph Jarzebowski, and it was understood that a security whereby they were to give him a mortgage on the lately owned property when the exchange was effected. To that end the attorney for the Czaplowskis on that occasion prepared such a mortgage, and at the same time a deed of the lately owned property to the Czaplowskis.

There was some evidence that these arrangements with Fisher were made at the request and for the benefit of both parties to the contract of exchange, and it is upon such a theory that Joseph Jarzebowski sought later to charge the proceeds of both parties with a lien for such advancement. But there is no evidence tending to show any assumption of

liability by complainant for what was necessary to be done to enable the Czaplewskis to get title to the property they were to exchange. It seems too clear for argument that the arrangements with Tabor were solely to enable the Czaplewskis to obtain title so that they could carry out their part of the contract, and that therefore they alone were obligated for the cash advanced and the expenses incurred in such arrangements. It was only through such arrangements the Czaplewskis obtained title to the property and were put in a position to carry out their contract, which a court subsequently held should be, and was enforced. Through the cash so advanced they were also relieved of the requirement in the contract of exchange to give complainant a second mortgage for $1000 on the Seeley avenue property. That as a result of such advancement of cash the Czaplewskis alone incurred the indebtedness to Joseph Wierzbowski, and that it was so understood between them, clearly appears from his own affidavit filed of record February 23, 1923, (more fully referred to hereinafter) and from his furnishing a statement to Jan Czaplewski four days later charging him with the amount so advanced, and also from the fact that he took from the Czaplewskis a mortgage to secure it. While that mortgage was finally, after the refusal of the Czaplewskis to consummate the deal, placed upon the Stave street property to which they still held title, nevertheless pursuant to the understanding between them the Czaplewskis' attorney had prepared a mortgage, as before stated, to cover, not the Stave street property, but the Seeley avenue property in expectation of the exchange. At the same time, February 6, 1923, the respective deeds to effect the exchange were executed and delivered in escrow to the respective attorneys

of the parties to be held until the Czaplewskis presented a deed from Tabor and secured releases of the replaced mortgages. But at an adjourned meeting on the following day the Czaplewskis refused to consummate the deal and directed the escrow holder not to deliver their deed to complainant. Thereupon on May 18, 1923, appellee filed a bill against the Czaplewskis for specific performance of the contract of exchange, and pursuant to a decree in her favor entered November 9, 1923, deeds effecting the exchange of the properties were executed, and she became possessed of the Stave street property, but with her title clouded by the documents aforesaid placed of record in the meantime.

After the Czaplewskis refused to consummate the contract for exchange Joseph Wierzbowski filed of record February 23, 1923, his affidavit aforesaid stating that the parties to the contract for said exchange of real estate, describing both properties, were brought together by him and that as the legal title to the Stave street property was in Tabor and the Czaplewskis had no money to pay him the balance due on his agreement for a warranty deed to them, and pay the first and second encumbrances on the same, he, Joseph Wierzbowski, secured a loan of $2500 on the real estate and advanced the moneys aforesaid to said Tabor to secure a warranty deed from him to the Czaplewskis, that they refused to consummate the deal, and, therefore, he claimed an equitable interest in the "aforesaid real estate," apparently referring to both properties. As before stated this affidavit expressly states that he made the advancement of cash for the Czaplewskis, and is inconsistent with his assertion of a claim of complainant's liability therefor. Later, March 22, 1923, he also placed of record said trust deed embodying a

trust note for $1750, signed by the Czaplewskis, purporting to convey to him the Stave street property in trust to secure the amount of said advancement. On said note he took judgment in the Municipal court against the Czaplewskis by confession July 2, 1923. An execution issued thereon July 5, 1923, was returned "No property found" November 4, 1923. Under an alias execution issued December 27, 1923 (after entry of the decree of specific performance and complainant had entered into the possession of the Stave street property) a levy was made under said alias execution on both the Stave street and Seeley avenue properties by the bailiff of the Municipal court and a certificate of sale of both properties was issued out of said court to said Joseph Wierzbowski for the sum of $1926.08, the amount of said judgment with interest.

The theory of the relief granted by the decree appealed from removing the several documents of record aforesaid as clouds on complainant's title to the Stave street property obtained through said decree for specific performance, is predicated upon the conceded fact that in procuring the contract for the exchange of said properties and arranging for its consummation, Joseph Wierzbowski was a broker and agent for complainant, as well as the Czaplewskis and on the unquestioned principle of law that as such agent he could acquire no right or interest in the property antagonistic or prejudicial to complainant as his principal. (Mechem on Agency, Ch. 2, Par. 455, p. 300; Cotton v. Holliday, 59 Ill. 176, 179; Davis v. Hamlin, 108 Ill. 39; Froehlich v. Peacord, 180 Ill. 85, 94; Conant v. Kiseborough, 139 Ill. 383; Roby v. Colehour, 135 Ill. 300, 337.)

That the title to complainant's property was thus

[illegible] note for $1750, signed by the Quapleweskis, petitioning to convey to him the State street property in trust to secure the amount of said advancement. On said note he took judgment in the Municipal court against the Quapleweskis by confession July 3, 1923. An execution issued thereon July 3, 1923, was returned "No property found" November 4, 1923. Under an alias execution issued December 27, 1923 (after entry of the decree of specific performance and complainant had entered into the possession of the State street property) a levy was made under which alias execution on both the State street and Shelby avenue properties by the bailiff of the Municipal court and a certificate of sale of both properties was issued one of said court to said [illegible] interpleader for the sum of $1500.00, the amount of said judgment with interest.

The theory of the relief prayed by the decree appealed from rests upon the general doctrines of tracing alternatives on behalf of complainant's title to the State street property obtained through said decree for specific performance, is predicated upon the concerted fact that in procuring the contract for the exchange of said properties and assuming for its consummation, though forwardly was a bidder and agent for complainant, as well as the employments and on the unconscionable principle of law that an agent may be could acquire no right or interest in the property [illegible] or prejudicial to complainant as his principal.

[illegible] on "Agency", Ch. 2, Sec. 499, p. 309; Zeigler v. Bailey, [illegible] 174, 178; [illegible] v. Smith, 138 Ill. 182; [illegible] v. [illegible], 138 Ill. 42, 47; [illegible] v. [illegible], 1 Ill. App. [illegible]; [illegible] v. Dickinson, 139 Ill. 300, 317.)

When the title to complainant's property was thus

clouded in the interest of one who was her agent to effect such exchange, and that the direct result of the instruments spread of record constituting such clouds was to increase without her consent the encumbrances on the Stave street property beyond what she was to assume, are manifest from the facts stated and as found by the court. That Joseph Wierzbowski could not obtain any advantage therefrom to the detriment of his principal, he having full notice of her rights under the contract of exchange, which in fact he, in the exercise of such agency, had negotiated for her, is well established by the authorities above cited.

Martin Wierzbowski was a brother and partner of Joseph at the time of these transactions, and as such, had an interest in the brokerage fees and commissions to be earned through them. With full knowledge of the contract for such exchange he afterwards, in July, 1923, secured a judgment by confession on a judgment note given to him by Jan Czaplewski for $175 and costs, and had a transcript thereof filed for record against the Stave street property. Under this state of facts the same principle which would prevent Joseph Wierzbowski from acquiring interests antagonistic and prejudicial to complainant applies equally to the claim of Martin Wierzbowski, and, therefore, the decree properly provides for the removal of his judgment as a cloud on complainant's title.

As most of the facts above stated are uncontroverted and are sufficiently established by the evidence we deem it unnecessary to discuss the contention that complainant did not prove her case by the greater weight of the evidence.

Equally untenable are the contentions that Joseph secured a valid interest in the Stave street property by his

[illegible]
[illegible]
[illegible]

advances of purchase money, and that he violated no fiduciary duty in securing a lien on the same therefor, and later a bailiff's deed upon the certificate of sale. It is enough to say that these contentions ignore the main fact of the relation of principal and agent between complainant and said Joseph, and the principle of law pertaining to the same, heretofore referred to.

Appellant also makes the point that a vendee who secures title by specific performance can secure no better title than his vendor has at the time performance is decreed. It must be manifest that the point has no application to the issues in this case as above stated and discussed.

It is further urged that the evidence discloses that by a balancing of accounts compl inant would still owe $100 to the Czaplewskis on the exchange, and that relief cannot be given complainant under her bill without an offer to pay the same. That was a matter that might have been raised and was presumably adjusted in the suit for specific performance.

The point is also made that complainant never paid the commissions to Joseph Wierzbowski agreed upon in the contract of exchange. The record discloses that that matter has been adjudged in another suit and judgment in a lower court.

It is also urged that the court erred in refusing Joseph Wierzbowski's offer to file a cross bill for affirmative relief. The offered cross bill is predicated almost entirely upon the uncontroverted facts above stated and alleged in the bill, except the main fact as to the relationship of agency as aforesaid on which the bill rests, and the conclusion therefrom that he had a valid lien on the Stave street property

for the purchase money advanced by him to the Czaplewskis to obtain the deed thereof. Whether he had such a lien was the main issue raised by the bill. If it had been determined in favor of appellant Joseph Sierzbowski, it follows the bill would have been dismissed, and that he would be free to assert his claim on the Stave street property and thus obtain all the relief to which he would be entitled. The offer was properly refused. In fact, it appears from the record that before the close of the hearing he obtained a bailiff's deed on said certificate. All the rights he claimed under the documents sought to be removed by the bill as clouds on complainant's title having thus become merged in said deed the decree not only removed them so far as clouds upon complainant's title, but declares said deed to be null and void and a cloud as to complainant and directs that Joseph Sierzbowski execute his quit-claim deed of the Stave street property to complainant. No point is made here that the decree in respect to said deed rests upon a fact arising after the issues were formed, appellants evidently having waived the formality of a supplemental bill setting up that fact, and any error in procedure in that respect.

The decree, therefore, is affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

92 - 31220

JULIUS HELFER,
Appellee,

v.

JOHN GENARELLA and
NICOLINA GENARELLA,
Appellants.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is bill to enforce a mechanic's lien. The property in question belongs to appellants, husband and wife. For their benefit the husband signed a written agreement with appellee by which appellee was to do certain work on the premises for the sum of $470. The agreement provided that "Helfer agrees to raise the building * * * 3 feet high on cedar posts, 6'6" and furnish all material and labor, also to put in the basement all around second-hand 2" planks for the foundation and the rest of 1" lumber, also to repair all four walls siding wherever it is necessary and repair the front fence, and put concrete coping long side of one wall and sidewalks."

The bill alleges that complainant completed the work called for in the contract, and that including the extras agreed upon, there was due him $691.91, on which defendant should be credited with a cash payment of $150, and the additional amount of $154.94 for lumber furnished by the Hartman Lumber Company if paid by defendants to the latter.

Said lumber company was permitted to file an intervening petition on the theory that it furnished such lumber to defendants, and the master found that it was

entitled to a lien on the premises for that amount. But it appearing from the evidence that said company furnished and delivered the lumber not to defendants but to complainant on his order, and that it did not comply with the statute giving a lien to a subcontractor, and therefore it was material furnished by complainant under his contract, the decree properly included the cost thereof in the amount for which he was entitled and given a lien.

Much immaterial evidence was received by the master, much of it relating to the parties' understanding and interpretation of the written contract. Presumably it was, and should be, disregarded.

The exceptions to the master's report were overruled and it was confirmed in all respects except as to the finding that the lumber company was entitled to a lien.

The other overruled exceptions on which error is assigned were to the effect that the master's report was contrary to the evidence and not in accordance with the contract in that complainant did not complete the same and defendants had to hire one Catanello to complete it at an extra cost of $100, and that the master failed to credit defendants with expenses incurred for plumbing and restoring a cement sidewalk, and that complainant was improperly given credit for certain strips put on the outside of the building.

We have carefully examined the evidence and while the limited knowledge of our language by defendants renders much of their evidence indefinite and unsatisfactory, yet giving it the most favorable interpretation we are not prepared

entitled to a lien on the premises for that amount". But it
appearing from the evidence that said company fraudulent and
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cost of $100, and that the master failed to credit defendants
with expenses incurred for plumbing and repairing a cement
basin, and that complainant was improperly given credit
for certain supplies put on the premises of the building.

We have carefully examined the evidence and while
a limited knowledge of our language by defendants renders
some of their evidence indefinite and unsatisfactory, yet
when it is the most favorable interpretation we are not prepared

to say that the court's findings were against the weight of the evidence.

As to the item of $100: The contract requires complainant "to put in the basement all around second-hand 2" planks for the foundation." From the evidence it appears that they were to be placed on top of the posts, and were not so placed by complainant. It shows, too, that the posts rested on the bare soil. Claiming that the contract in these respects was not completed, appellants hired one Catanello to put a foundation of concrete under the posts, and place the planks where complainant "was supposed to put them but did not." For such work and other work not included in the contract, but assumed to be by defendants, Catanello was paid a lump sum of $100. If completion of the contract required placing some kind of a foundation beneath the posts and placing such planks on top of the posts or otherwise than placed by complainant, yet in the absence of proof of the reasonable cost of that part of the work for which complainant could be held liable the court could not give defendants credit for $100, or any definite part thereof.

The credits claimed for plumbing work did not come under the provisions of the contract. The court, however, allowed something for the new cement sidewalk and presumably for that reason charged defendants with only two-thirds of the costs, which amount to $137.50. Testimony relating to that subject and also to the strips is not sufficiently clear and certain to warrant a change in the finding.

It is urged that the evidence does not show that the allowances made complainant for extra work were the

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he evidence.

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The credits claimed for plumbing work did not come
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ever something for the new cement sidewalk and properly
that reason charged defendants with only two-thirds of the
ge, which amounts to $117.50. Testimony relating to that
ject and also to the strips is not sufficiently clear and
ficient to warrant a change in the finding.

It is urged that the evidence does not show that
allegation made complainant for extra work were the

reasonable, fair and usual cost of the same. This point not having been made in the court below, cannot be raised here for the first time.

While the decree should have expressly disposed of the intervening petition the point is not raised. Finding no reversible error we will affirm the decree.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

120 - 31249

WILLIAM G. HARLEY and
CHARLES W. HARLEY,
Plaintiffs in Error,

v.

GEORGE S. HALAS and
EDWARD C. STERNAMAN,
Defendants in Error.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

244 I.A. 6394

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This writ seeks the review of a decree dismissing complainants' bill for want of equity. The bill alleged a partnership relation between the parties and sought an accounting. The partnership agreement was entered into July 18, 1921, "to manage the Decatur Staley Football Team." No definite term of the duration of the partnership was fixed and no definite arrangements were made between them for conducting a football team for the season of 1922. One was, however, conducted by defendants, and the bill seeks an accounting from them for the profits of both years.

The evidence presents the questions whether the partnership was not dissolved before the football season of 1922, and whether there was any necessity for an accounting. The findings of the master on those questions were against complainants, and the question before us is mainly whether they are supported by the weight of the evidence. We think they are. Reaching that conclusion it is unnecessary and would be impracticable to review the conflicting and voluminous testimony from which his conclusions were deduced. We shall, therefore, merely recite the salient facts found upon which they rest.

In the year 1920 the A. E. Staley Manufacturing Company of Decatur, Illinois, being interested in promoting athletics among its employes, organized and conducted a football team known as the Decatur Staley Football Team. Among its employes were the two defendants, who were prominent football players. The football club was a member of the American Professional Football Association, composed of a large number of football teams of various cities of the country. Defendant Halas was active in securing prominent players for the Staley team in 1920, and the early part of 1921. In 1920 these players were employed on a salary to work for the Staley Company and were to receive from it a share of the profits from the games played by the team, after the deduction of expenses. The team was operated in 1921 mainly to advertise the company's business. The company appointed Halas as its athletic director. The team played that year in various cities, including Chicago.

In the spring of 1921 the company decided to move the headquarters of the team from Decatur to Chicago during the play season. To that end its superintendent, Geo. Chamberlain, on January 27, 1921, negotiated with W. L. Veeck, president of the Chicago National League Ball Club, and secured a written lease from it for the use of its baseball park (called the Cubs Ball Park) in Chicago for the last three months of 1921, which was signed in the name of the Chicago Club by Veeck, its president, and by the A. E. Staley Manufacturing Company, by Halas as its representative.

Halas at once became active in procuring contracts from prominent players in addition to those already on the team and conferred with complainant William G. Harley, who was not

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as the Decatur Staley Football Team. Among its employees were the
following determinants, who were prominent football players. The foot-
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for advertising the company's business. The company appointed Hales
its athletic director. The team played ninety year in various
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headquarters of the team from Decatur to Chicago during the play
season. To that end its superintendent, Geo. Chamberlain, on
January 27, 1921, negotiated with C. L. Young, president of the
Chicago National League Ball Club, and secured a written lease
on its for the use of its baseball park (making the club Ball
park) in Chicago for the last three months of 1921, which was
signed in the name of the Chicago club by Young, its president,
and by the A. E. Staley Manufacturing Company, by Hales as its
representative.

Hales at once became active in promoting competitive
games and prominent players in addition to those already on the team
and conferred with Commissioner William R. Harley, who was not

a football player, with the view of securing the services of his brother Charles, the co-complainant, who was noted as a player, and other players whose services as such were controlled by said William Harley. The conferences resulted in the partnership agreement above referred to, which reads as follows: "Charles W. Harley, Edward C. Sternaman, William Harley and George S. Halas enter into an agreement this 18th day of July, 1921, to manage the Decatur Staley Football Team and to share equally the profits and losses of said team. The above four named will present to Geo. E. Chamberlain periodically during the football season of 1921, a sum of money to be designated by them." Said agreement was signed by each of the said four named parties.

Pursuant to the arrangement the club entered into the season games at the Cubs' park, in the middle of October. William Harley attended to certain business matters and had charge of the gates of admission, and the other parties to the agreement were players on the team.

October 6, 1921, the Staley Company addressed a letter to "The Staley Football Team" confirming a verbal agreement to place the names of all the football players (not to exceed 19) on the company's payrolls at a salary of $25 a week, with the exception of those already being taken care of on regular jobs, until it paid $5,000, including $3,000 to be paid for advertising in the football team's score book, the agreement to end at the close of the football season. An agreement to that effect was entered into and signed the same day in the names of the A. E. Staley Manufacturing Company, by its president, and the "Staley Football Club," by George S. Halas, manager, and Edward C. Sternaman, both employes of the company on its regular payroll.

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a broker Hartley, the co-complainant, who was noted as a
player, and other players whose services on such were contributed
said William Hartley. The conferences resulted in the partner-
ship agreement above referred to, which reads as follows:

"Article 1. Hartley, Edward G. Stevenson, William Hartley and
George E. Helms enter into an agreement this 15th day of July,
1921, to manage the Decatur Staley Football Team and to share
equally the profits and losses of said team. The above four
men will present to Geo. E. Chamberlain potentially winning
football season of 1921, a sum of money to be distributed by
them." Said agreement was signed by each of the said four
men parties.

Pursuant to the arrangement the club entered into the
season games at the Park park, in the middle of October. William
Hartley attended to certain business matters and had charge of
the gates of admittance, and the other parties to the agreement
the players on the team.

October 4, 1921, the Staley Company advanced a letter
"The Staley Football Team" specifying a verbal agreement to
pay the names of all the football players (not to exceed 15)
the company's payroll at a salary of $50 a week, with the
exception of those already being taken care of on regular jobs,
at it was $2,000, including $3,000 to be paid for advertising
the football team's game book, the agreement to end at the
end of the football season. An agreement to that effect was
entered into and signed the same day in the names of the G. E.
Staley Manufacturing Company, by its president, and the "Staley
Football Club," by George E. Helms, manager, and Edward G.
Stevenson, both employees of the company on its regular payroll.

The profits of the season, which approximated $21,600, were drawn from the bank February 16, 192[illegible], where the funds of the club were deposited, and distributed equally among the parties to the partnership agreement. Only $7.71 interest on the bank account remained undistributed, but the same was subject to the joint order of William G. Harley and the two defendants. Said sum and certain sweaters and towels in possession of defendants constituted all the assets of the partnership not distributed, and these were tendered to complainants before the institution of the suit and again before the master, and as the master found are still subject to delivery on the continuing tender.

The partnership agreement apparently contemplated a partnership only for the season of 1921, as it specifically referred to periodic reports to Chamberlain "during the football season of 1921." However, no agreement was entered into between the parties for the following year. It appears, however, that in January, 1922, negotiations were had between Chamberlain, the superintendent of the Staley Manufacturing Company, and the president of the Chicago National League Ball Club with reference to obtaining a lease of the Cubs ball park for the football season of 1922. In its correspondence the Staley Company expressed the intention to place another football team in the field, and stated that it had no other representative at that time than its said superintendent. In an interview that followed between Veeck and Chamberlain, at which defendants were present, Veeck said that defendants would have to be a governing part of the football team of the "Staley people" if they were to secure the lease. Chamberlain said that defendants would have to go back to Decatur where the matter of their connection with the football

The profits of the season, which approximated $[illegible],000,
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[illegible] constituted all the assets of the partnership not distributed.
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The partnership agreement apparently commenced a
[illegible]ercially only for the season of 1[illegible], as it specifically
[illegible]ness to publish reports to Christmas "during the remainder
[illegible] of 1[illegible]." However, the relationship was extended into between
[illegible] partner for the following year. It appears, however, that
[illegible]ary, 1[illegible], negotiations were had between Christmas,
[illegible] representatives of the Dairy Manufacturing Company, and the
[illegible]tees of the Chicago Building Trades Well (Law with reference
[illegible] a lease of the Dairy hall place for the Jubilee season
[illegible]. In the correspondence the Dairy Company expressed the
[illegible] to place Mammoth Jubilee Band in the field, and stated
[illegible] it had no other representative at that time than the said
[illegible]. In an interview that followed between Frank and
[illegible], at which defendants were present, Frank said that
[illegible] would have to be a provision made of the Jubilee
[illegible] of the "Dairy people" if they were to assume the lease.
[illegible] said that defendants would have to go back to
[illegible] where the matter of their connection with the Jubilee

team would be arranged, but that he had made up his mind that defendants would not manage it. The following day, January 18, 1922, the Staley Company sent a letter to Veeck stating that the company had concluded to withdraw its application for the use of the park for 1922 and discontinue its athletic connections. The company did not operate a football team for that year and forbade the use of the name of the team.

Thereafter William Harley, acting apparently solely in his own interest, and Halas and Sternaman likewise acting only in their joint interests, sought a lease from Veeck of the Cubs park for the year 1922. Veeck said he would give the lease to whoever obtained the franchise from the American Professional Football Association. Afterwards at its meeting in Canton, Ohio, January 28, 1922, Harley presented an application therefor in his own name, and Halas and Sternaman presented one in their name and that of the Chicago Bear Football Club, to operate a football team in Chicago for the year 1922. The franchise was granted to the latter and later they secured a lease for the use of the Cubs park from Veeck. Both the franchise and lease were granted to them in the name of the Chicago Bears Football Club, Inc., which defendants organized and controlled, and with which the Harleys had no connection. Harley attended said meeting of the association and was present at the session when the respective applications were discussed and the franchise was granted to defendants. At the meeting Harley also applied for and was granted a franchise in his own name to operate a team at Milwaukee, although he had previously made a trip there with regard to the matter at the expense of the partnership. Later in the summer of 1922 he applied to the president of the Staley

Manufacturing Company for the right to use the Staley name for a football club to be operated at another football park in Chicago. The request was denied. While Harley claimed that the application was made at the instance of Halas, the latter denied any knowledge of Harley's intention to apply to Staley for such purpose, and Staley, the president of the company, testified that Harley did not mention any other than himself as interested in the project.

At a meeting of the association, then known as the National Football League, August 20, 1922, at Dayton, Harley applied for and was granted a franchise in his own name to operate a football team at Toledo for that season. Harley and Halas also disagree as to whether this application was made in the interest of the partnership. From these various incidents the master correctly found, we think, an expressed intention of the parties to discontinue the old partnership relation.

The contracts with the players followed the prescribed form required by the national league. Those for the year 1921 were between the individual players and the Staley Football Club, and those for the year 1922 between the players and the Chicago Bears Football Club, Inc. By provisions in the players' contracts the club by written notice to the players prior to a certain date might renew the contract for the term of that year, except that the salary should be such as the parties might then agree upon, or, in default of the agreement, such as the club might fix. The player was required to accept the salary thus fixed or else not play during the year otherwise than for the club, unless released by it. This reservation

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[illegible] football club to be operated as another football part-
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[illegible] Chicago Bears Football Club, Inc. By provisions in the
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[illegible] might fix. The player was required to accept the salary thus
[illegible]ed or else not play during the year otherwise than for the
[illegible], unless released by it. This reservation

of the club and the promise of the players not to play during the year otherwise than with the club were expressly taken into consideration in fixing the salary, and the undertaking to pay it.

The constitution and by-laws of the football association also contain the provision that in the event that an organization holding membership in the association ceases to exist, the other members of the association were to be duly notified and furnished with the names and addresses of the players released by said organization. Also that in the event a joint partnership holds membership in the association and is dissolved, the disposition of the players formerly under contract with it must be made by the former partners, and the secretary-treasurer notified of the details of the settlement.

There was no proof of any action taken under the latter provision. But complainants maintain by reason of the reservation clause in the contract with the players they acquired valuable rights in their contracts which constituted an asset of the partnership at the close of the football season of 1921. They also contend that the partnership has never been dissolved and no account taken or settlement made.

The master found that by reason of the refusal of the Staley Manufacturing Company to continue its connection with professional football for the year 1922, and by its failure to apply for a renewal of its franchise to operate as a member of the professional football association that on or after January 28, 1922, the Staley Football Club ceased to exist as a football club and as a member of said association, and that on that date the partnership arrangement terminated, and that no other partnership was formed between the parties to this suit. The

the club and the promise of the players not to play during
year otherwise than with the club were expressly taken into
consideration in fixing the salary, and the understanding to pay it.

The commissioner and by-laws of the football association
contain the provision that in the event that an organization
being responsible in the association ceases to exist, the other
officers of the association were to be duly notified and furnished
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made in the contract with the players they acquired valuable
rights in their contracts which constituted an asset of the
association at the close of the football season of 1921. They
contend that the partnership has never been dissolved and
account taken or settlement made.

The master found that by reason of the refusal of the
Kansas Athletic Company to continue its connection with
Professional Football for the year 1922, and by its failure to
pay for a renewal of its franchise to operate as a member of
professional football association then or at later January
1922, the State Football Club ceased to exist as a football
club and as a member of said association, and that on that date
certainly arrangements terminated, and that no other
partnership was formed between the parties in this suit. The

master further found that the reservation clause in the players' contracts for 1921 was unenforcible against such players on the dissolution of the Staley Club, and was not enforcible in favor of the Chicago Bears Football Club, or by any of the parties to this suit, and that none of said parties had any ownership or control over the players after that date, and, therefore, that the players' contracts with the Staley Club and its good will cannot be accounted a partnership asset of the parties to this suit.

In reaching these conclusions the master necessarily had to accept the conclusions of one witness or another where their testimony was conflicting. On the version of the evidence accepted by him we see no occasion for questioning his conclusions. The Staley Football Club was formed and organized by the Staley Manufacturing Company. Its athletic director, Halas, was to manage the club. It was used as a medium of advertising the Staley Company's business. The company practically turned the club over to its athletic manager to continue on with its name for the season of 1921 under the terms specified, whereby the same was to be conducted by the manager of the club with an expense to the Staley Manufacturing Company of $5,000. The partnership contract was one to manage the club for the four parties to this suit, and for the division of the profits and losses between them. No time was fixed for the termination of the partnership, and the agreement between them and the Staley Manufacturing Company did not contemplate arrangements either between themselves or with the Staley Manufacturing Company beyond the end of the football season for 1921. And when the Staley Manufacturing Company, which held the lease for the use of the Chicago Baseball Park, concluded not to have a football team

for the year 1922, and refused to grant the use of its name for that purpose the Staley Football Team, with which the contracts with the players were made, unquestionably ceased to exist, and with it fell the arrangement for any further management of that club by the partnership. As a consequence the partnership was dissolved, not only by the completion of the business for which it was formed, but by the express will of the partners as indicated by their several actions recognizing that their agreement was limited to the management of the Staley Football Club, and that the attitude of the Staley Manufacturing Company required a new arrangement. It is clear that none was made between the parties to this suit. If one was ever contemplated it was never effected. The various steps taken by the parties separately, as above stated, indicated no intention on their part to act collectively or as a partnership after the Staley Manufacturing Company withdrew from the field and they divided the profits of the closed season of 1921.

Under the recognized causes of dissolution of partnership both by the statute (sec. 31, ch. 106a, Cahill's Ill. R. S.) and authorities on the subject we think there can be no doubt of the dissolution of the partnership in or shortly after January, 1922. (Story on Partnership, sec. 280; Parsons on Partnership, sec. 283; Rowley's Modern Law on Partnership, sec. 572; Bank of Montreal v. Page, 90 Ill. 109; Mohrer v. Drake, 33 Minn. 408, 410; Kennedy v. Porter, 109 N. Y. 526.)

The general doctrine as stated in sec. 573 by Rowley, and the authorities there referred to, is as follows: "If the length of life of a partnership has not been definitely fixed, the firm exists in general at will and may be dissolved whenever any one of its members bona fide so chooses." It was held in

Blake v. Sweeting et al., 121 Ill. 69, that where the partnership was not for a definite term it might be dissolved by any member of the firm at his pleasure by notice to his copartners, and that the act of one of them in going away and abandoning the business and property of the firm was of itself sufficient notice of his desire to terminate the copartnership relation. The knowledge each of the parties here had of the separate applications for a franchise from the National Association to operate a football club for the 1922 season in Chicago was sufficient notice of the will of the partners to terminate their prior relation. They well knew that whoever got the franchise would get the lease for the Cubs park and that the other would necessarily be excluded from its benefits without a new arrangement between them. That the partnership was effectually dissolved cannot be doubted.

Inasmuch as all the profits from the partnership were distributed, except the small sum of $7.71, which with the tangible property left was tendered before the suit was begun, as aforesaid, and inasmuch as there were no other assets to form the basis of an accounting, we think the bill was properly dismissed for want of equity.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

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ALICE C. LEVERENZ, administratrix of the estate of Jeanne B. Leverenz, deceased,
Appellant,

v.

FRANK La ROSA,
Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Jeanne B. Leverenz, deceased, for whose estate this suit was brought under the Injuries Act, was run into by defendant's automobile and killed.

The declaration contains five counts, charging respectively, negligence (1) in failure to give a warning; (2) in operating the automobile with side curtains on; (3) in wilfully and wantonly operating the automobile, and (4 and 5) in operating it at an unreasonable rate of speed.

The court took the wilful and wanton count from the jury. On the other issues raised there was a verdict for defendant.

While appellant has assigned and argued several alleged errors, in our view of the case we need consider only the alleged error instructing the jury at the close of plaintiff's evidence to find the defendant not guilty of wilful and wanton negligence.

The accident took place after dark when the streets were lighted from street lamps and stores along the street, about 7 o'clock p. m., October 2, 1924. It happened on West 35th street between Winchester and Robey streets.

ick C. LIVINGS, administrator
the estate of James E. Jackson,
ased,

Appellant,

v.

ANK LA ROSA,

Appellee.

CIRCUIT COURT,

COOK COUNTY.

E. JUSTICE BARRY DELIVERED THE OPINION OF THE COURT.

James E. Jackson, deceased, for whose wrongful death
it was brought under the statutes but, was run into by
fendant's automobile and killed.

The declaration contains five counts, charging
respectively, negligence (1) in failure to give a warning;
) in operating the automobile with defective and (3)
'wilfully and wantonly operating the automobile, and (4
5) in operating it at an unreasonable rate of speed.

The court took the wilful and wanton counts from
e jury. On the other issues raised there was a verdict
r defendant.

While appellant has assigned and argued several
ingued errors, in our view of the case we need consider
ly the alleged error instructing the jury at the close
plaintiff's evidence to find the defendant not guilty
wilful and wanton negligence.

The accident took place after dark when the streets
re lighted from street lamps and stores along the street.
ound 7 o'clock p. m., October 8, 1934. It happened on
st 55th street between Lindenter and Ashby streets.

The south side of the block was completely built up with business stores. The north side contained some stores and cottages and some vacant lots. The little girl's parents lived in or over one of the stores on the south side of the block, somewhere near its middle. She left her home and went out on the street a very short time before the accident, apparently to get some candy with a penny her father had given her, and was struck by defendant's automobile while he was driving the same west on the north (or west bound) street car track. No witness, not even defendant, noticed her crossing the street, and the testimony does not definitely disclose from which side she came. It tended to show, we think, that she came from the south side.

Plaintiff's evidence was to the effect that defendant was driving at the rate of 25 miles an hour; that the street was clear from curb to curb at the particular point where the accident happened, and that there was no other passing vehicle or car on the street to obscure his vision of anyone leaving the sidewalk from either side near the place of the accident; that plaintiff was driving in a car with closed curtains; that he put on his brakes at the moment of the impact and the car ran some 50 feet before it stopped.

We shall not discuss whether such a state of facts constitutes wanton and wilful negligence as defined in the following cases referred to in the briefs. (People v. Toohey, 319 Ill. 113; Jenesry v. C. & I. Tr. Co., 306 id. 392; People v. Falkovitch, 280 id. 321; People v. Camberis, 297 id. 455; People v. Schwartz, 293 id. 218; Jones v. Kramer, 235 Ill. App. 362; Lund v. Osborne, 200 Ill. App. 457.) But without repeating what was said in them we

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business stores. The north side contained some stores and
garages and some vacant lots. The little girl's parents
lived in or over one of the stores on the south side of the
block, somewhere near the middle. The lot her home was
set out on the street a very short time before the accident,
probably to get some candy with a penny her father had
given her, and was struck by defendant's automobile while
she was driving the same west on the north (or west bound)
street car track. No witness, not even defendant, noticed
her crossing the street, and the testimony was not definitely
conclusive from which side she came. It tended to show, on
the whole, that she came from the south side.

Plaintiff's evidence was to the effect that defendant
was driving at the rate of 35 miles an hour; that the street
car stopped from such a rate as the particular point where the
accident happened, and that there was no other passing vehicle
near on the street to obscure his vision of anyone leaving
the sidewalk from either side near the place of the accident;
that plaintiff was driving in a car with closed ventilator
and he put on his brakes at the moment of the impact and
stopped his car run some 80 feet before it stopped.

We shall not discuss whether such a state of facts
constitutes wanton and willful negligence as defined in the
driving cases referred to in the briefs. (People v. Fowler,
[illegible] Ill. 112; Hanaky v. T. & L. Co., 306 Ill. 307;
[illegible] v. Fairbrother, 306 Ill. 149; People v. Dunbrie,
[illegible] Ill. 488; People v. Murphy, [illegible] Ill. 181; Jones v.
[illegible], 236 Ill. App. 388; Hand v. Osborne, 300 Ill. App.
[illegible].) But without repeating what was said in them we

think they fully justify holding that it was a question of fact for the jury to determine whether the speed at which plaintiff was driving, being, as it was, at a rate which the statute makes prima facie negligence, together with the detailed circumstances, constituted wanton and wilful negligence as defined in those cases.

The decisions relied on by appellee involve mainly consideration of the weight of the evidence as to wanton and wilful negligence, a matter, as before stated, not open for consideration of the court in giving said instruction.

As the judgment must be reversed for such error and the cause remanded for a new trial it is improper for us to discuss at this time the weight of the evidence in the case, and unnecessary to consider alleged error in giving other instructions complained of.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

150 - 31280

JOHN WESTWOOD,
Appellee,

v.

ROSE BODINGTON,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree in chancery. The bill was filed by John Westwood and his son Tracy, but as the decree found that Tracy was not entitled to relief, we shall refer to John Westwood as the complainant, and to the bill only so far as it involves him and the defendant.

As amended, the bill and the proof in support thereof are predicated on the claim that complainant and defendant entered into an oral agreement for the purchase of certain real estate; that she was to, and did advance $2700 for him on the initial payment, for which he assigned to her as collateral for the advancement ten shares of stock of approximately that value; that she took the title in her name and holds it in trust for them; that she has repudiated the agreement and claims that he has no interest in the real estate and that the shares of stock were given to her as a present, and refuses to account for the dividends thereon, or to return the stock.

The prayer of the bill is that she be ordered to return the stock or pay the fair market value thereof, alleged to be $2650 on April 20, 1924, and asks that she be decreed to pay whatever is due from her.

The answer denied that there was any such agreement

and that complainant contributed any sum whatever toward the purchase of the property, and alleges that the same was purchased by her with her own money, and the deed taken in her name. It makes no reference to the stock.

Before filing her answer defendant filed a demurrer to the bill, and while it was pending both parties came into court by their respective counsel and entered into a stipulation to the effect that if complainant could establish her claim the property should be sold, and each should receive from the proceeds of the sale an amount proportionate to what he had paid upon the property, as should appear "from an agreement subsequently to be made or determined by the findings of the court."

Thereafter the parties came before the court and represented that they were willing to go ahead upon the stipulation, and agreed in open court that pleadings should be filed later to conform to the findings of the court upon the evidence.

Upon such understanding the court proceeded to hear evidence and after the same was closed the pleadings aforesaid were filed. Thereupon the court entered the decree appealed from, finding, among other things, that the pleadings had been filed in pursuance of the stipulation. While this is not strictly correct, it being an oral agreement, it is important only as confirming complainant's contention of such an understanding.

Counsel for appellant dwell at length on the contention of a different understanding. While the procedure was irregular and confusing, we think the case must be considered upon the issues raised by the pleadings and the evidence material thereto.

that complainant contributed any sum whatever toward the
chase of the property, and alleges that the same was pur-
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Thereafter the parties came before the court and
represented that they were willing to go ahead upon the
stipulation, and agreed in open court that pleadings should be
ed later to conform to the findings of the court upon the
issue.

Upon such understanding the court proceeded to hear
mony and after the case was closed the pleadings referred
e filed. Thereupon the court entered the decree appealed
m, finding, among other things, that the pleadings had been
ed in pursuance of the stipulation. While this is not
ically correct, it being an oral agreement, it is immaterial
r a controlling complainant's contention at such an enter-
ning.

Counsel for appellant treat it simply as the continuation
a different material matter. Also the procedure was irregular
considering, so that the case must be considered upon the
ence related by the pleadings and the evidence material thereto.

The decree finds that John Westwood and defendant entered into an agreement to purchase said real estate, that he gave her said stock as security for making the initial payment on said property, that she has rescinded the contract and converted said stock to her own use, that the market value thereof at that time was $2650; that she is in possession of the same and should account therefor.

The decree orders defendant to pay complainant said sum within twenty days with interest from April 20, 1924, and costs of the suit, and in default thereof an execution issue therefor and be a lien upon such stock and the real estate of defendant.

The main fact in controversy was whether there was any such agreement. The complainant John Westwood, together with his son Tracy, and the latter's wife, who claimed to be present at the time of the conversation about the purchase, testified there was, and defendant and her daughter, who claimed to be present and that the others were not present, denied there was any such agreement, but testified that the stock was given to her in accordance with his previous expressed intention.

We deem it unnecessary to repeat the conflicting testimony on the subject. Whether there was such an agreement or such a gift depended entirely upon the chancellor's view of the credibility of the witnesses. As he had a better opportunity than we for determining their credibility we find no good reason for questioning the correctness of his conclusion that there was such an agreement, and that the stock was assigned to her to be held as collateral, and not as a gift.

Complainant did not seek the enforcement of the

alleged trust. In fact, the proof shows that he was in no position to do so. He never in fact paid any money of his own for the property. But if defendant made an agreement with him of the character stated and received the assignment of his stock in pursuance thereof, and refused, as found in the decree, to carry out said agreement, then appellee was entitled on demand made in April, 1924, either to have the stock reissued to him, or, on her refusal to reassign it, to receive its market value as of that date.

It is only upon that theory that the decree, under the allegations and proof, could rest. But it does not properly conform to that theory, and accordingly it must be reversed with directions for proper modification.

The proof does not show a conversion of the stock. It still stands in her name and in her possession as when delivered to her. The bill asks for its return or its market value. The decree should provide for its reassignment and delivery, or on failure thereof within a specific time, that she pay the value of the stock as agreed upon, with interest at five per cent from April 20, 1924, the date of demand therefor, together with the amount of dividends received thereon. The execution of the amount decreed would be a lien on any real estate defendant might then hold but it should not be made by decree a specific lien on the real estate in question.

Accordingly the decree will be reversed and remanded with directions for its modification as herein outlined, each party to pay his own costs.

REMANDED
REVERSED WITH DIRECTIONS FOR
MODIFICATION OF THE DECREE.

Gridley, P. J., and Fitch, J., concur.

162 - 31293

FEDERAL TRUCK COMPANY OF CHICAGO,
(a corporation),
Appellant,

v.

JOHN J. KIRBY,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff began this suit in replevin to obtain possession of a Mack automobile truck upon which it held a mortgage. Defendant Kirby, the mortgagor, having refused to turn over the property, leave was given to proceed in trover. The case was heard without a jury, and the court found defendant not guilty. The question presented is whether the finding and judgment are not contrary to the evidence.

The mortgage was given for $1000 to secure part of the purchase price of a Federal truck sold by plaintiff to defendant. Defendant's affidavit of merits does not deny the mortgage, the detention or the value of the Mack truck, alleged to be $1000, but claims he has paid the mortgage indebtedness in full. The only issue of fact, therefore, was whether there was anything due on the mortgage.

The uncontroverted facts are as follows: Plaintiff's salesman solicited defendant Kirby to buy a Federal truck and drafted a memorandum of an order May 2, 1924,

on one of plaintiff's blank forms, containing among other conditions that it is valid only when accepted and signed by a "duly authorized officer of the distributor," and "shall not be binding upon the distributor until it is accepted in writing by the general manager or general sales manager."

This order was never accepted nor signed by either party. Five days later, May 7, after a conference by the agent and defendant with plaintiff's manager, another order containing the same conditions and stating that "there is no understanding, agreement or representations expressed or implied, not specified herein, relative to the goods herein ordered," was duly accepted by the manager and signed in plaintiff's name by him as its manager and by defendant as purchaser.

The unsigned order designated the price of the truck at $5374 and allowed "10% fleet owners' discount, $537." No such discount was contained in the signed order, nor authorized. The unsigned order was apparently incomplete for it specified no terms of payment. The signed order provided that plaintiff would take defendant's Mack truck for sale, if possible, $1000 of the selling price to be applied on the purchase of the Federal truck, and a separate written agreement was drawn up and signed by the parties to carry out that arrangement, whereby defendant was to turn over his Mack truck to be sold by plaintiff on certain terms, and was to give his note for the said $1000, and a chattel mortgage on the Mack truck to secure the same, to be cancelled when the Mack truck was sold on the terms specified, and if not sold within 60 days defendant was to pay the note in cash as part of the purchase price of the Federal truck.

one of plaintiff's blank forms, containing among other
conditions that it is valid only when accepted and signed by a
duly authorized officer of the distributor," and "shall not
binding upon the distributor until it is accepted in writing
the general manager or general sales manager."

This order was never accepted nor signed by either
party. Five days later, May 7, after a conference by the
and defendant with plaintiff's manager, another order
containing the same conditions and stating that "there is
understanding, agreement or representations expressed or
implied, not specified herein, relative to the goods herein
described," was duly accepted by the manager and signed in
plaintiff's name by him as its manager and by defendant as
purchaser.

The unsigned order designated the price of the truck
STATE and stated "FOB Plant owners' discount, STAT." No
discount was contained in the signed order, nor authorized.
unsigned order was apparently intelligible for its specified
term of payment. The signed order provided that plaintiff
sold the defendant's Mack truck for sale, if possible, GIVEN
the selling price to be applied on the purchase of the Federal
truck, and a separate written agreement was given by the signed
the parties to carry out that arrangement, whereby defendant
to take over his Mack truck to be sold by plaintiff on
their terms, and was to give his note for the sum $1000, and
pledged mortgage on the Mack truck to secure the same, to be
called when the Mack truck was sold on the terms specified.
It was sold within 60 days defendant was to pay the note
with as part of the purchase price of the Federal truck.

The note and mortgage were executed. Credit was also given for a Union truck for $1250, which defendant turned over to plaintiff, and for the balance of the purchase price defendant gave other notes and a chattel mortgage on the Federal truck to secure the same. Being unable to sell the Mack truck plaintiff returned it to defendant. The final papers were executed June 6, 1924, and the Federal truck was delivered with an invoice designating the price therein as $5169, and crediting defendant with the $1250 and the amount of said notes and mortgages.

It was admitted that he paid towards the purchase price of $5169 the sum of $4105.50 (including the allowance of $1250 for the Union truck), thus leaving a balance of $1063.50, as claimed by plaintiff. It was also admitted that the only difference between them was whether or not defendant should be allowed the so-called "fleet owners' discount" of $537 according to the unsigned order.

It seems too clear for argument that inasmuch as the unsigned order was never accepted or signed by plaintiff or its general manager or general sales manager, as essential to its validity by its very terms, and both parties subsequently signed a new order which made defendant no such allowance, and according to which both parties subsequently acted, the unsigned order had no validity and defendant by his conduct is estopped from asserting that it had. The entry subsequently into a signed contract with different terms is absolutely inconsistent with defendant's claim. Whatever the previous negotiations and conversations it is elementary that they merged into the written, signed contract. Where parties contemplate, as they did here, reducing their agreement to writing the contract is not complete until it is executed. (B. & O. S. W. R. Co. v. People, 195 Ill. 423, 428.)

The court's findings were unquestionably contrary to the entire evidence.

Defendant did not deny in his pleadings either the detention of the property or its value. The chattel mortgage provided for possession by plaintiff upon default of payment. The evidence shows, so far as the mortgage on the Mack truck is concerned, that defendant is in default of payment, and on his demand therefor plaintiff was entitled to its possession. The court, therefore, should have made a finding and entered a judgment in trover for what was not paid on the mortgage or the note it was given to secure.

The balance of the indebtedness for the Federal truck was conceded to be $1063.50 if defendant was not allowed the said discount of $537.50. But this suit is not to recover the balance of such indebtedness but simply the value of the converted property so far as plaintiff has any interest in it. That interest was only to the extent of $350, defendant having paid $650 on said mortgage, and been credited therewith on the note it was given to secure. Consequently the court's finding and judgment should have been for plaintiff in the amount of $350, with interest at 8% from November 11, 1924, amounting to $41.50. There will be a reversal of the judgment and entry of judgment here for the sum of $391.50 with findings of fact.

REVERSED WITH FINDINGS OF FACT
AND JUDGMENT HERE FOR $391.50.

Gridley, P. J., and Fitch, J., concur.

162 - 31293

FINDINGS OF FACT.

We find that the property in question was mortgaged to plaintiff to secure a note for $1000, on which the sum of $650 has been paid, that the balance of $350 and interest to date, amounting in all to $391.50, remains unpaid, that said mortgage is due and defendant is in default in the payment of said sum secured thereby and that he has converted the property so mortgaged, and that its value exceeds the sum so remaining unpaid.

177 - 31309

KAROLINE BYWALEC, Appellee, v. JOSEPH BYWALEC, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order holding appellant in contempt of court for his wilful failure to pay his former wife $950 in compliance with the decree entered in her divorce suit against him. From the praecipe record before us, it appears, as recited in the decree of divorce, that the parties entered into an agreement to adjust property rights and alimony whereby the wife was to convey to the husband all her right, title and interest in and to certain real estate, and waive and release all right of alimony, and he was to pay her $900. The decree ordered the conveyance, and that he pay such sum in satisfaction of all alimony, and also $250 for and on account of her solicitor's fees and expenses in the case.

The order was entered on the rule to show cause and defendant's oral testimony in answer, and finds that at the time the rule was entered said sum of money was due under the decree and unpaid, and that defendant had ample financial means to pay the same, and held him in contempt as aforesaid, and ordered that he be taken into custody by the sheriff and committed in the county jail not to exceed six months unless he purge himself by such payment.

The clerk certified to the record as per praecipe "excepting mittimus which has not been returned and does not appear of record in file." Appellant's counsel urges therefrom that no mittimus was issued and that his client was taken into custody on the order without process. The assumption has no basis in the record, and if it had, it has no bearing on the sufficiency of the order appealed from or any question of error in the record. If appellant was taken into custody and without proper process he may have waived process, for aught the record discloses; and if he did not waive it, his remedy is not by appeal from the order, the validity of which would not be affected by an improper method of executing it.

Appellant's only other point is that the payment of the money was conditional on the wife's execution of the conveyance, and that it does not appear in the record that she executed and delivered it. Appellant has not seen fit to preserve either the affidavit on which the writ was issued, or the oral testimony in answer thereto. Presumably they would show compliance with the decree on appellee's part and would support the express finding in the order that the sum decreed to be paid was due at the time of the entry of the rule. Such finding presupposes compliance with the order on the part of appellee. It cannot be said that there is not a sufficient finding of facts upon which to base the order. Finding no error in the record we affirm the order.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

The clerk certified to the record as per precedent
accepting minutes which has not been returned and does not
appear of record in file." Appellant's counsel urges therefrom
that no minutes was issued and that his client was taken into
custody on the order without process. The assumption has no
basis in the record, and if it had, it has no bearing on the
sufficiency of the order appealed from or any question of error
in the record. If appellant was taken into custody and without
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indicates and if he did not waive it, his remedy is not by
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support thereto. Presumably they would show compliance with the
terms on appellee's part and would support the express finding
in the order that the sum decreed to be paid was due at the time
of the entry of the rule. Such finding presupposes compliance
with the order on the part of appellee. It cannot be said that
there is not a sufficient finding of facts upon which to base the
order. Finding no error in the record we affirm the order.

APPEARED:

Bailey, F. L., and Fitch, J., counsel.

205 - 31337

HENRY G. WOOY, Appellant, v. MORRIS SLOTT, Appellee.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a personal injury suit. Plaintiff, while crossing the street, was run into by an automobile driven by defendant, knocking him down, breaking two ribs, bruising him in various parts of the body, spraining his ankle, knocking out three teeth and loosening eight others so that they had to be drawn. He was confined to his bed or room in much pain for nearly three weeks and under the care of a physician. The greater part of the time since then he has been nervous and weak and unable to put in a full day's work. He incurred a medical expense of $51. The jury allowed as damages $150. It is urged that the damages are utterly inadequate compensation for the injuries received, and that the court should have granted plaintiff's motion for a new trial. We concur in the contention. It is too manifestly well-founded to require discussion. It is well settled by the weight of authority, and not questioned here, that an unreasonably small verdict, as well as a grossly excessive one, is subject to review by the courts and should be set aside and a new trial awarded in the interests of justice.

Appellee urges that the plaintiff was guilty of

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[illegible] finally settled by the weight of authority, and not questioned here.
[illegible] is too manifestly self-evident to require discussion. It is
[illegible] plaintiff's motion for a new trial. A counsel in the contention
[illegible] the instrument received, and that the court should have granted
[illegible] contained expenses of 201. The jury allowed as damages $1400.
[illegible] is urged that the damages are utterly inadequate considering
[illegible] medical expenses of 201. The jury allowed as damages $1400.
[illegible] week and months so put in a full day's work. He incurred
[illegible] the greater part of the time since he has been motorman
[illegible] for nearly three weeks and under the care of a physician.
[illegible] be true. He was confined to his bed or room for much
[illegible] that they are there needs and increasing which shows so that they
[illegible] in various parts of the body, causing his ankle, muscle
[illegible] 24 [illegible] 6.10.
[illegible] MR. JUSTICE BRAMER DELIVERED THE OPINION.
[illegible] This is a personal injury suit. Plaintiff, while
[illegible] crossing the street, was run into by an automobile driven by
[illegible] defendant, knocking his head, bruising the right, muscle
[illegible] in various parts of the body, causing his ankle, muscle
[illegible] and injuring which shows so that they
[illegible] be true. He was confined to his bed or room for much
[illegible] for nearly three weeks and under the care of a physician.
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[illegible] on unreasonably small verdicts, as well as a clearly excessive
[illegible] is subject to review by the courts and should be set aside
[illegible] a new trial granted in the interests of justice.
Appellee urges that the plaintiff was guilty of

ANNEXT TOWN CITIZENS
COUNTY, DOOR COUNTY.

contributory negligence and not entitled to any judgment. That was a question of fact decided against appellee by the jury, and one that could not be taken into consideration on the question before us.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

5

214 - 31346

THE STARR PIANO COMPANY SALES CORPORATION,
Appellant,

v.

MORRIS FISHER et al.,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a replevin action brought to recover possession of a piano and phonograph which were originally bought from plaintiff by Joseph Fisher, the father of defendant, who lives with the defendant.

The evidence discloses that subsequently, March 5, 1925, Joseph Fisher filed a petition and schedule in bankruptcy and did not schedule the piano and phonograph in question; that complainant's agent called on Joseph Fisher on June 19, 1925, with reference to an unpaid balance on the transactions and to renew the mortgages, and asked Joseph Fisher to sign the new mortgages presented to him. Fisher said Morris now owned the goods and should sign the new mortgages, which Morris did in the presence of his father. Subsequently Morris Fisher made payments under the new mortgages, both in cash and by his personal check. Being in default a demand was made upon him for delivery of the chattels. The demand not being complied with this suit was brought. The balance due on the piano, as testified to, is $74.63, and on the phonograph, $62.37.

Both the defendant his father testified. Neither

of them contended that the whole indebtedness had been paid, and admitted that both were present when the son signed the chattel mortgages in question. The court remarked after hearing such evidence: "It looks as though this man (the father) would be foreclosed, now, from denying that there was a transfer of title there to the son, and that the son signing the chattel mortgages there established him the owner." There was a continuance of the hearing, after which Joseph Fisher's schedule in bankruptcy was introduced showing that Joseph Fisher did not schedule the property as his own. Nevertheless the court, in disregard of such evidence, found for the defendant and entered an order of retorno habendo.

It is difficult to understand from the record the theory of the court's decision, unless it was influenced by the contention of defendant that plaintiff's agent threatened action under the prior mortgages unless he signed the new mortgages. Even if he did so it did not amount to compulsion or duress. The only proper construction of the evidence is that the mortgages in question were valid, and under their terms plaintiff was entitled to possession of the mortgaged property on failure of defendant to comply with the demand made upon him.

The judgment is reversed and a judgment entered here finding the right of possession of the property to be in the plaintiff.

REVERSED WITH A FINDING OF FACT.

Gridley, P. J., and Fitch, J., concur.

214 - 31346

FINDING OF FACT.

We find that appellant, The Starr Piano Sales Corporation, was at the time of bringing this action, and the time of judgment, entitled to the right of possession of the mortgaged piano and phonograph in question.

224 - 31356

IN RE PETITION OF JOHN NIGG, arrested at the suit of Rosie Seniw, Appellant, v. THE PEOPLE OF THE STATE OF ILLINOIS, Appellee.	APPEAL FROM COUNTY COURT, COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant, being held by a capias ad satisfaciendum issued on a judgment against him in the Superior court of Cook county, filed a petition in the County court for discharge under the Insolvent Debtors' Act. The petition was dismissed and appellant was remanded to the custody of the sheriff.

The first point made on this appeal is that the record does not disclose that malice was the gist of the action in which the judgment on which said execution issued, was rendered. The execution was issued upon a judgment against appellant in an action of trespass vi et armis for an assault and battery. It is the settled law in this State that malice is the gist of such an action. It was said in In re Kitterman v. The People, 181 Ill. App. 682, that it is settled law in this State that malice is the gist of such an action, citing various cases. Hence we need not enlarge upon the subject.

It is urged that because the action was begun against four defendants, all of whom except appellant were dismissed out of the case without an amendment of the

declaration, it is impossible to ascertain upon which of the defendants the blame rested, and that, therefore, malice should have been specifically set out in the declaration. There was only one issue in the case, namely, whether there was an assault and battery vi et armis from the charge of which malice is implied. (Salomon v. Buechele, 127 Ill. App. 420.) The character of the action in this respect was not different from a case of trespass vi et armis because of the use of the word "case" in the commencement of the declaration characterizing the general nature of the action. Under our statute either form of action would be appropriate. (Sec. 36, Practice Act.) The failure to amend the declaration on dismissal of the other defendants did not change the character of it as charging a tortious act against defendant, and if there were any defects of procedure in that case they are not open to inquiry in this proceeding. The contention that by reason of the dismissal of said defendants the issues were not joined as to the petitioner is not tenable.

It is also urged that the sheriff failed to endorse on the capias "who paid the board" that was advanced after petitioner's arrest. Any irregularity in that respect is not open to question in this proceeding. The only issue before the County court was whether malice was the gist of the action in the case under which petitioner was arrested.

It is also urged that after the three defendants were dismissed out of the case and it proceeded as to petitioner he had no notice thereof. Neither is this a question open to inquiry in this proceeding. It appears, however, he was represented by counsel.

It is also urged that the special finding of malice was necessary, citing cases where there was a diversity of issues in some of which malice was not the gist of the action. Here there was only one count in which malice was the gist of the action.

Counsel also urges that there was error in the action in which the judgment was rendered in granting a remittitur, and in giving an instruction to the jury. They are collateral attacks upon the judgment, and are not subject to investigation in this proceeding.

The judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

40 - 31637

PETRONELLA ZONCA and PETER ZONCA,
Plaintiffs in Error,

v.

JOSEPH OPSADEK, a minor, by AUGUST OPSADEK, his father and next friend, and ED JOHNSON, Trustee in bankruptcy of the estate of PETER ZONCA, bankrupt,
Defendants in Error.

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This writ of error is sued out to reverse the decree dismissing for want of equity a bill of review. The bill was filed to set aside a decree entered by default in a creditors' bill brought by defendants in error against plaintiffs in error.

Relief is sought by the bill on two grounds, - that there is error apparent on the face of the record, and fraud in procuring the decree.

The alleged error on the face of the record consists, as claimed by plaintiffs in error, of findings and relief awarded by the decree in the creditors' bill suit "that do not correspond with and transcend the allegations contained in the bill and supplemental bill of complaint in the creditors' suit." In other words it is urged as error on the face of the record that relief was granted by the decree that was not prayed for, and the cause of action under the supplemental bill did not exist as of the date of the filing of the original bill in the creditors' suit.

A like question was raised in Hegner v. Hoover,

[illegible] - SIGEY

[illegible] KEITH and [illegible] JAMES,
Plaintiffs in Error,

v.

[illegible] WRAY, a minor, by
[illegible] of guardian, his father and
[illegible] Friend, and Mr. [illegible],
[illegible] in behalf of the
[illegible] of MATTHEW EDWARD, Deceased,
Defendants in Error.

Error to
[illegible] COUNTY.
COOK COUNTY.

[illegible] ERROR TO THE CIRCUIT COURT OF COOK COUNTY.

This writ of error is sued out to review the decree [illegible] dismissing for want of equity a bill of review. The bill was [illegible] filed to set aside a decree entered by default in a contest [illegible] bill brought by defendants in error against plaintiffs in error.

Belief is sought by the bill on two grounds: - that [illegible] error appears on the face of the record, and fraud in [illegible] procuring the decree.

The alleged error on the face of the record consists, [illegible] claimed by plaintiffs in error, of finding and relief [illegible] granted by the decree in the probateers' bill such "that do not [illegible] correspond with and transcend the allegations contained in the [illegible] bill and supplemental bill of complaint in the probateers' suit." [illegible] other words it is urged as error on the face of the record [illegible] that relief was granted by the decree that was not prayed for. [illegible] the cause of action under the supplemental bill did not [illegible] at or the date of the filing of the original bill in the [illegible] probateers' suit.

A like question was raised in Kenney v. Hunter,

318 Ill. 169, 174. The court said:

> "It is evident that the court had jurisdiction of the parties and of the subject matter, and where this is so its decree will not be set aside in a proceeding of this character on the allegation that it is not sustained by the pleadings. Errors which present questions of procedure and not jurisdiction, and do not reach the matter of the right of the court to hear and decide a cause, go only to the question of the correctness of the court's decision and are not open on a bill of review."

To the same effect is the case of Vyverberg v. Vyverberg, 310 Ill. 599, 603. The record not being open to review upon such a ground it is unnecessary to compare the bill with the decree.

The fraud relied upon is that when notices of asking leave to file a supplemental bill and for default of the Zoncas for failure to answer the same, were served upon Jankowski, one of the counsel for the Zoncas as defendants in the creditors' suit, he informed counsel for complainants therein in one instance, and their agent in another, that he no longer represented the Zoncas, and in disregard of that fact complainants in the creditors' bill "acted fraudulently and wrongfully in not giving personal notice to the Zoncas." The facts so relied upon do not support such a conclusion. Appearance was filed in that suit for the Zoncas by said Jankowski and one Bryzezewski as their attorneys. They filed a general demurrer to the bill, which was overruled. No answer was thereafter filed, and the said notices of later proceedings were served on Jankowski personally, the other attorney having departed from the city. The fact that the Zoncas had no personal knowledge of the neglect of their counsel to take care of their interests is immaterial. The negligence of an attorney employed in a matter will be imputed to a client. (Nitsche v. City of Chicago, 280 Ill. 268.)

A solicitor having entered his appearance of record for a client cannot terminate the relationship until there is a withdrawal of record by leave of the court, and the relation is not terminated without such withdrawal, at least so far as the opposite party is concerned, until the end of the litigation. (Krieger v. Krieger, 221 Ill. 479, 484, and cases there cited.) As said in Regner v. Hoover, supra, in order to grant relief under a bill of review on account of fraud, it must show that the complainant was prevented from interposing a defense by fraud and without negligence or fault upon his part, and that the burden of proof is upon one charging fraud to establish it by clear and satisfactory evidence. While the claim of having given counsel for complainants in the creditors' suit notice of Jankowski's withdrawal from the case was positively denied by those to whom he claimed to have given such notice, yet whether it was given or not, complainants in that suit had the right to recognize him as the counsel for defendants therein until he was properly relieved of his duty by an order of court. Not only were the averments of fraud insufficient to sustain the bill of review on that ground but they were not substantiated by the proof in the case.

The court was amply justified in dismissing the bill for want of equity.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

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9 - 30862

JOSEPH B. RABAN,
Plaintiff in Error,

v.

FRANK MAHR and ELLA MAHR,
Defendants in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

244 I.A. 641

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Plaintiff obtained a judgment by confession for $2252.05 upon defendants' four judgment notes dated April 10, 1924, authorizing such a judgment to be confessed "at any time hereafter." The notes were payable "on or before sixty months after date." Twelve days after the judgment was entered, on motion of defendants, accompanied by an affidavit of one of them, an order was entered staying the execution until April 10, 1929. Nine days thereafter, a motion by the plaintiff to expunge the order staying the execution was overruled. Plaintiff brought this writ of error, assigning as error both of such rulings. The defendants have not appeared or filed any brief in this court.

The affidavit filed with the motion to stay the execution sets forth that the defendants are the owners of certain real estate in Chicago, which they acquired on April 10, 1924; that as part of the purchase price they executed and delivered to the grantors certain notes, payable monthly in succession, the last four of which are the notes upon which judgment was confessed; that such notes are secured by a trust deed upon the property purchased and that defendants have promptly paid the monthly notes as they matured, and the accrued

interest, and complied with all the terms and conditions of the trust deed, and were not in default in any manner at the time the judgment was confessed. The affidavit states that the notes "are by their terms not due and payable until April 10, 1929." This affidavit and the notes and warrants of attorney appear to be the only evidence that was heard by the court on the motion to stay the execution. So far as the record shows, no evidence was offered or heard on the motion to expunge the order staying the execution.

Where a power of attorney authorizes the confession of a judgment upon a note "at any time hereafter" a judgment may lawfully be confessed at any time after the note is executed. This is so well settled as not to require any extended citation of authorities. One of the earliest cases in which it was so held is the case of Sherman v. Baddely, 11 Ill. 622. There the court construes such a clause in the warrant of attorney to be a contract giving the creditor the right, "if he chooses to assert it, of having a judgment entered up at any moment for the amount of the debt." The court said further: "The defendant has no right to complain of the judgment, for he deliberately authorized it to be entered. The note was due, for the purposes of the judgment, by the express stipulation of the maker. Having a valid judgment, the plaintiff was entitled to an execution thereon."

It is true that courts at law exercise equitable jurisdiction over judgments by confession (Lake v. Cook, 15 Ill. 353; Farwell v. Huston, 151 Ill. 239), and on a motion to vacate such a judgment the question is not whether there are errors of law, but whether equitable reasons exist why it should not be opened to let in a defense. (Mumford v. Tolman, 157 Ill. 258.)

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trust deed, and were not in default in any manner at the time
the judgment was confessed. The affidavit states that the notes
were by their terms due and payable until April 10, 1899."
This affidavit and the notes and warrants of attorney appear
to be the only evidence that was heard by the court on the motion
to stay the execution. So far as the record shows, no evidence
was offered or heard on the motion to enjoin the order staying
the execution.

There is power of attorney authorizing the confession of
judgment upon a note "at any time hereafter" a judgment may
properly be confessed at any time after the note is executed.
This is no well settled as not to require any extended citation of
authorities. One of the earliest cases in which it was so held is
the case of Thomson v. Dodsley, 11 Ill. 686. There the court con-
sidered such a clause in the warrant of attorney to be a continued
waiver the condition the right, "if he chooses to insert it, of
having a judgment entered up at any moment for the amount of the
note." The court said further: "The defendant has no right to
complain of the judgment, for he deliberately authorized it to be
entered. The note was due, for the purposes of the judgment, by
the express stipulation of the maker. Having a valid judgment,
the plaintiff was entitled to an execution thereon."

It is true that courts of law exercise equitable juris-
diction over judgments by confession (Lake v. Gough, 16 Ill. 382;
Hall v. Dunlap, 183 Ill. 238), and on a motion to vacate such
judgment the question is not whether there are errors of law,
but whether equitable reasons exist why it should not be opened
up in a defense. (Mumford v. Tolman, 187 Ill. 388.)

But as the only defense alleged in this case is that the notes were not due, while the contrary appears from the face of the notes, the motions of the defendants present no equitable reason to open the judgment to let in that defense. Ordinarily the words "on or before" give the maker of the note the option to pay on the day stated or before that time, but under the reasoning in Sherman v. Baddely, supra, the usual meaning of the words "on or before" is changed in these notes by the language of the warrant of attorney so as to make the time of payment "depend on the pleasure of the creditor," instead of the debtor.

It might be inferred, perhaps, from the affidavit filed, that when they signed the judgment notes defendants did not know that judgment could be entered upon them at any time. But there is nothing in the affidavit tending to show that such lack of knowledge, if any, on their part, was due to any fraud or misrepresentation of the plaintiff, or that there was any understanding or agreement that judgments should not be confessed until April 10, 1929.

For the reasons stated, the order staying the execution is reversed.

ORDER REVERSED.

Gridley, P. J., and Barnes, J., concur.

296 - 31122

DANIEL JOHNSON, LOUIS SPANOPLE and J. N. SPANOPLE, for the use of NICK SPERGPOULOS, Appellees, vs. JOHN A. OHLIN et al., Garnishees, on Appeal of JOHN A. OHLIN, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

244 I.A. 641

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against the defendant in a garnishment proceeding brought upon the theory that defendant is liable, as garnishee, to the judgment creditor of the three nominal plaintiffs, for the value of property used in the business of one of them, alleged to have been purchased by defendant without complying with the provisions of the Bulk Sales act.

In October, 1922, the Ascher Rosewood Theatre Company leased its motion picture theater in Chicago to Daniel Johnson and Louis Spanople, two of the nominal plaintiffs, and sold them the furnishings, fixtures and equipment for $7000. The purchasers gave their notes for $5500 of the purchase price, secured by their chattel mortgage on the property purchased and the leasehold. In January, 1923, they borrowed from the real plaintiff, Nick Speropoulos, $1500 and gave him their fifteen notes for $100 each, payable monthly, secured by a second chattel mortgage on the same property.

In July, 1923, Johnson and Louis Spanople sold the property and assigned the leasehold to John N. Spanople, the third of the nominal plaintiffs. By the terms of the bill of sale then executed and delivered to John N. Spanople, the conveyance was made subject to the first mortgage, which the purchaser assumed and agreed to pay. At the same time, John N. Spanople signed, as co-maker, the fifteen notes payable to Speropoulos which were secured by the

second mortgage.

John N. Spanople ran the theater for several months, but was unable to meet the payments accruing on the chattel mortgage notes, and in November, 1923, he sold the same goods and chattels to the defendant, Ohlin, subject to both of the chattel mortgages. John N. Spanople testified that he "couldn't make a go of it, lost big money, too much money involved in there, stepped out." He also testified that at the time he sold the furnishings and equipment of the theater to defendant, he made no affidavit as to his creditors and mailed no notice of the transaction to Sperepoulos.

It appears that defendant paid nothing for the property and the only consideration John N. Spanople received for his bill of sale to defendant was defendant's promise to obtain from the Theatre company a cancellation of the lease and a receipt in full for the rent due and for the balance of the purchase price of the goods and chattels included in its chattel mortgage. Whether the Theatre company ever gave John N. Spanople a receipt in full does not appear, but it does appear that eventually it assigned its mortgage to one Grechebaum, who foreclosed it and bid in the property for the amount due on the first mortgage, leaving the second unpaid.

On July 31, 1924, Sperepoulos caused a judgment by confession to be entered in his favor against the three nominal plaintiffs upon the fifteen notes signed by them which had been secured by the second mortgage. Upon this judgment an execution was issued and returned no property found and no part satisfied, and in March, 1925, this garnishment proceeding was brought on that judgment.

Defendant contends that the Bulk Sales act has no application to the sale of the property from John N. Spanople to

the defendant garnishee, for the reason that the claim of the judgment creditor, Sperepoulos, was secured by the second chattel mortgage on the property and the sale was expressly made subject to that mortgage. The statute makes no such distinction between secured and unsecured creditors. It applies "to any sale in bulk of the major part or all of the goods and chattels of the vendor's business otherwise than in the ordinary course of trade and in the regular and usual prosecution of the vendor's business." (LaSalle Opera House Co. v. LaSalle Amusement Co., 289 Ill. 194.) The property in question constituted all the goods and chattels used in the business of John N. Spanople conducted in the Ascher Rosewood Theatre, and such goods and chattels were sold to defendant "otherwise than in the ordinary course of trade and in the regular and usual prosecution of the vendor's business." It follows, we think, that the Bulk Sales act applies to the sale in question, which was therefore void, as against the creditors of John N. Spanople, unless the statutory five days notice was given to them of the price, terms and conditions of the sale.

Was such a notice given? The record leaves this question in doubt. The Bulk Sales act requires such a notice to be given by the vendee, either by personal delivery to the creditors of the vendor or by registered mail. The creditor in this case, Sperepoulos, did not testify on that subject. The vendee, Ohlin, did not testify at all. The vendor, J. N. Spanople, merely testified that at the time he made the sale he did not make any affidavit of any kind as to his creditors. We think the evidence on this subject is not sufficient to show that no notice was given of the proposed sale, especially in view of the fact that when Sperepoulos was on the witness stand, he was not asked and did not say whether he received from Ohlin a notice of the sale, or whether he knew of such

sale before it was made.

Moreover, we fail to find any proof in the record of the value of John N. Spanople's interest in the property at the time it was sold, and the witnesses do not agree that Ohlin received more than the amount of the judgment. It was essential to prove one or the other. (Konski v. Smith, 224 Ill. App. 206.) There is evidence that Ohlin said he received $7000 "in money and notes" when he sold the property to one Spanuth; but Spanople testified that he received nothing from Ohlin except his agreement as above stated, that when Ohlin transferred the property to Spanuth, the latter gave Ohlin a check or a note for an unknown amount, and when Spanople asked Ohlin "if he got enough money," he (Ohlin) replied: "About a thousand dollars. That's all." The details of the Spanuth transaction are not given. As the record shows that the Theatre company originally sold the property for $7000, free from encumbrances, and as the sale to Ohlin was made subject to mortgages, aggregating $7000, it seems improbable that the value of the interest in the property that was sold to Ohlin was worth more than the money he received from Spanuth. At all events, this evidence leaves it very uncertain whether Ohlin received from Spanuth for Spanople's interest in the property as much as $1031.15, the amount of the judgment, which is the full amount of the indebtedness to Speropoules.

Furthermore, the judgment is in favor of Speropoules for the use of the three nominal plaintiffs, while it clearly appears from the evidence that Ohlin had no property in his possession belonging to all three of the nominal plaintiffs. If the Bulk Sales act was not complied with, the property in Ohlin's possession, or its proceeds, belonged to John N. Spanople alone. Section 1 of the Garnishment act was amended in 1923 so as to permit a judgment to be entered in such a case against the

[illegible] in which it was made.

[illegible] However, we feel it is fair to find any proof in the record of the value of John H. Dynegyle's interest in the property at the time it was sold, and the witnesses do not agree that Dillin received more than the amount of the judgment. It was accordingly to have one or the other. (Bennett v. Smith, 304 Ill. App. 304.) There is evidence that Dillin said he received $7000 "in money and notes" when he sold the property to one Dynegyle; but Dynegyle testified that he received nothing from Dillin except his agreement to pay stated. That when Dillin transferred the property to Smith, the latter gave Dillin a check or a note for an unknown amount, and when Dynegyle asked Dillin "if he got enough money," Dillin replied: "About a thousand dollars. That's all."

The details of the Dynegyle transaction are not given. As the record shows that the Smith company originally sold the property for $7000, from commissions, and on the sale to Dillin was subject to mortgages, aggregating $7000, it seems impossible that the value of the interest in the property that was sold to Dillin was worth more than the money he received from Dynegyle. In any event, this evidence leaves it very uncertain whether Dillin received from Dynegyle for Dynegyle's interest in the property as much as $1001.12, the amount of the judgment, which is the full amount of the indebtedness to Oppenheimer.

Furthermore, the judgment is in favor of Oppenheimer and the one of the three nominal plaintiffs, while it clearly appears from the evidence that Dillin had no property in his possession belonging to all three of the nominal plaintiffs. If the Dillin Lumber Co. was not sometimes with, the property in Dillin's possession, or its proceeds, belonged to John H. Dynegyle alone. Section 2 of the Conveyance Act was amended in 1905 so as to permit a judgment to be entered in such a case against the

garnishee in favor of one or more of the original defendants for the use of the plaintiff if it appears that the garnishee has effects in his possession belonging to such one or more of the original defendants. If no error was shown in the record prior to the entry of the judgment, this error in the form of the judgment could be corrected by reversing and remanding with directions to enter the proper judgment (McNulta v. Enoch, 134 Ill. 46; Gage v. People, 163 Ill. 39); but in view of the other errors above mentioned, the judgment must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

46 - 31160

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. WILLIAM H. HEYWARD, individually and as president of and for the ILLINOIS DIAMOND CAB COMPANY, a corporation, Appellants,	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	
WILLIAM E. DEVER, as Mayor, etc., et al., Appellees.	244 I.A. 642

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order denying a writ of mandamus which was sought by appellants to compel the issuance to them of taxicab licenses.

Appellants' petition alleges that in October, 1925, they applied for such licenses, under ordinances of the city of Chicago, which provide that all licenses "shall be issued as of January 1 and shall expire on December 31 next succeeding." The order appealed from was entered on December 28, 1925. If a writ had been issued on that day, the licenses would have been good for three days. The appeal bond was approved on January 23, 1926, after the licenses, if issued, would have expired.

It appears that the cabs sought to be covered by the licenses were formerly operated by the Diamond Cab Company, which became insolvent, and thereafter two Illinois corporations were formed, one called "Chicago Diamond Taxi Company," to which licenses were issued in 1925, and the other, whose application was refused, called "Illinois Diamond Cab Company." The answer of the respondents states that licenses were

refused to appellants because of a rule known as Rule 5, adopted by the Public Vehicle License Commission of Chicago, forbidding the issuance of licenses to cabs painted or labelled so like other cabs previously licensed and operating, as to be calculated to deceive the public.

Appellants claim that rule 5 is void. Respondents say the validity of that rule is not involved, but that for five other reasons the writ was properly denied. One of such reasons, at least, seems to be good, namely, that the ordinances require the owner's name to be printed on taxicabs in large letters, and that was not done in this case.

However, in view of the fact that the license period for which licenses were sought has long since expired, appellants could now derive no practical benefit from a reversal of the judgment. The questions involved are now purely moot questions. "It is a well recognized principle that courts, in exercising their jurisdiction in mandamus, will not award the peremptory writ where the right sought to be enforced is or has become a mere abstract right, the enforcement of which, by reason of some change of circumstances since the commencement of the suit, can be of no substantial or practical benefit to the petitioner." (Gromley v. Day, 114 Ill. 185, 189. See also Christman v. Peck, et al., 90 Ill. 150; The People v. Burke, 274 Ill. 55; The People ex rel. Wilson v. Rose, 81 Ill. App. 387; and The People v. Stevens, 152 Ill. App. 118.)

The judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

95 - 31223

JOHN F. SHANNON,
Appellant,

v.

MICHAEL NASH,
Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for the defendant in an action for assault and battery. The plea was self defense. There were two trials, the first resulting in a disagreement and the second in a verdict of not guilty. The plaintiff claims, justly, we think, that the verdict is manifestly against the weight of the evidence.

The assault occurred in February, 1923. Plaintiff was then a motorman and defendant a policeman. They took their meals at the same boarding house, run by a Mrs. Kelly. Plaintiff and defendant were seated side by side at the breakfast table and talking across the table to another boarder, named Healy. Plaintiff claims defendant was intoxicated, and the facts seem to bear out the claim. A dispute arose and Mrs. Kelly moved the plaintiff's chair to the end of the table. Plaintiff testified that when he finished his breakfast, he arose and moved towards the door, that defendant arose at the same time and went around the table, intercepting plaintiff, and struck him a vicious blow in the face, causing a compound fracture of the nasal bones which required a surgical operation and was the cause of considerable loss to the plaintiff. Defendant testified that for two or three minutes after plaintiff's chair was moved, the latter "was arguing and saying how he

could lick me," and then "walked around the table and struck it with his fist and telling me what he would do to me * * * and I stood up, and he was coming towards me * * * with this motion (indicating) and I came to the conclusion * * * I would not let this fellow slap me all over the place, and I struck him in the nose." Plaintiff's story is corroborated by the testimony of Mrs. Kelly and of Healy, while defendant's story is entirely without corroboration.

It appears from the arguments filed here that the probable cause of the jury's verdict was the fact that plaintiff and the landlady, Mrs. Kelly, both testified that after the occurrence in question, plaintiff did not work for two years, while it appears from a stipulation made during the trial that plaintiff worked for the street car company from the date of the accident, February 12, 1923 until May 8, 1924, except from April 23, 1923, to August 5, 1923. On the basis of this evidence, defendant's counsel argues here - and presumably made the same argument to the jury - that the whole testimony of the plaintiff and of Mrs. Kelly should be disregarded because both testified falsely "in a matter material to the issue." The matter referred to was material only as to the amount of damages and was not at all material to the main issue of liability. Moreover, counsel concedes that under the rule invoked, the jury were not at liberty to disregard that part of the testimony of the plaintiff and of Mrs. Kelly that is "corroborated by other credible evidence;" and practically all of their testimony as to what happened at the time of the assault was corroborated by the testimony of Healy, who was present and is apparently disinterested. His testimony,

as well as theirs, shows clearly that the defendant was the aggressor. (Ogden v. Claycomb, 52 Ill. 366; Wells v. Englehart, 118 Ill. App. 217.)

For the reasons stated, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

114 - 31243

F. S. HENDRICKS, doing business under the firm name and style of F. S. Hendricks & Co.,
Appellee,

v.

SAM ORNER,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for $855 for breach of a written contract. Plaintiff is a real estate broker and defendant the owner of a building in Chicago containing eight stores and twenty-two apartments. In October, 1924, they executed, simultaneously, two written contracts, one a lease and the other an agency contract.

The lease demised to the plaintiff two of defendant's stores, to be occupied as a real estate office for a term beginning October 15, 1924, and ending April 30, 1928, the lessee to take possession of one store at the beginning of the term and pay $125 a month rent for it until May 1, 1925, and then to take possession of the other store and pay thereafter for both $300 a month rent.

By the terms of the agency contract defendant agreed to "turn over the renting and management" of the whole building to plaintiff for a period of one year from May 1, 1925, and to pay him a commission equal to two and one-half per cent of the rents collected, provided that if defendant sold the building during that period and failed "to have the purchaser assume this

agreement," then defendant agreed to pay the plaintiff "a sum equal to one-third of the commission for collection of rents for the unexpired term of said period."

Plaintiff took possession of the two stores as agreed and expended over $5000 in permanent alterations and improvements in fitting them up for his use. In March, 1925, defendant gave him a new lease for five years from May 1, 1925, at the same rental of $300 a month. The agency contract was never carried out. When it was executed the building was in charge of other agents, whose contract expired on May 1, 1925, and was then extended by the defendant for one year longer.

Plaintiff claims that he asked defendant several times before May 1, 1925, to turn over the renting and management of the building to him as agreed and that defendant said he would do so "in a few days." Defendant claims the agency contract was cancelled when the new lease was given.

On June 6, 1925, defendant sold the building and notified plaintiff that his other agents were authorized to collect the rents. This suit followed.

Upon the question of fact involved, the evidence is in hopeless conflict. Defendant and one other witness testified that the agency contract was cancelled. Plaintiff and one other witness testified to the contrary. There was no jury, and after reading the evidence in the record we cannot say that the finding of the trial judge, who saw and heard the witnesses, was manifestly against the weight of the evidence.

It is urged that the agency contract lacks mutuality in that it contains no agreement on plaintiff's part to manage and rent the building for the defendant. A similar contention

company," then defendant agreed to pay the plaintiff "a sum
al to one-third of the commission for collection of rents
the unexpired term of said period."

Plaintiff took possession of the two stores on agreed
expended over $8000 in permanent alterations and improve-
s in fitting them up for his use. In March, 1922, defendant
o him a new lease for five years from May 1, 1922, at the same
tal of $200 a month. The agency contract was never carried
. Then it was conceded the building was in charge of other
ts, whose contract expired on May 1, 1922, and was then
ended by the defendant for one year longer.

Plaintiff claims that he asked defendant several times
ore May 1, 1922, to turn over the renting and management of
building to him as agreed and that defendant said he would
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the trial judge, who saw and heard the witnesses, was mani-
tly against the weight of the evidence.

It is urged that the agency contract lacks mutuality
that it contains no agreement on plaintiff's part to manage
rent the building for the defendant. A similar contention

to a contract of agency or employment was held unsound in Butterick Publishing Co. v. Whitcomb, 225 Ill. 605. Upon the authority of that case, we think the obligations of the contract in this case were mutual.

The court awarded damages equal to a full commission of two and one-half per cent upon the amount of rents collected by the lessors during the year covered by the agency contract. In this the court erred. The contract fixes the measure of damages for such a breach as is shown by the evidence, at a sum equal to one-third of the amount recovered. The judgment should have been for $285 instead of $855. For this error the judgment is reversed, and because there can be no dispute as to the stipulated measure of damages, the cause will not be remanded but a judgment will be entered in this court in plaintiff's favor against the defendant for $285.

REVERSED AND JUDGMENT HERE.

Gridley, P. J., and Barnes, J., concur.

123 - 31253

KATHERINE FELKE and ANTON J. FELKE, Guardian of the estate of EDWIN FELKE, etc., Plaintiffs in Error, v. JOSEPH HEINZEN and MILDRED C. KISEMAN, individually and as copartners under the firm name of Kiseman and Heinzen, Defendants in Error.	ERROR TO CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Complainants' second amended bill was dismissed for want of equity after the demurrer of defendants to it had been sustained. Complainants appeal.

Complainants' counsel correctly states that "the bill is one in the nature of a bill of review to correct error on the face of the record and for an accounting by defendants for money alleged to have been improperly paid to them for fees as solicitors in a partition suit in which they represented Katherine Felke (one of the complainants herein) as complainant." The bill was filed without leave of court, and the questions presented by the demurrer are whether such leave was necessary, or whether the bill can be sustained as a bill to correct errors appearing on the face of the prior decree, or to impeach that decree for fraud.

It appears from the allegations of the bill and from the exhibits (which are attached thereto and specifically made a part thereof) that after a decree had been entered for partition of the premises described in the bill, and after

such premises had been sold to one of the complainants and the sale confirmed by the court, an order was made for the distribution of the proceeds of the sale. This order was based upon evidence taken upon a re-reference for that purpose and the order directs that $4000 be paid "to Eiseman & Heinzen, for solicitors' fees," instead of being taxed as costs in favor of complainant. This was error (McMullen v. Reynolds, 209 Ill. 504, 508) apparent on the face of the record.

It is further alleged in the bill that the complainant Katherine Felke employed the defendant Heinzen, an attorney, to bring suit for partition of the real estate mentioned, of which she owned an undivided five-eighths interest and also had dower and a homestead estate in the remainder, owned by her three minor children; that no other person had any interest in or claim upon the property; that defendant's firm is named throughout the pleadings as complainants' solicitors; that the complainant Katherine Felke relied wholly upon the advice of the defendant Heinzen and signed without question all papers and documents he advised her to sign; that in the matter of the allowance of solicitors' fees, defendants, while purporting to act for and represent her, acted secretly and without any notice to her and without her knowledge or approval; that the fees allowed and paid to them are grossly excessive, and that she did not learn the facts regarding the allowance and payment of solicitors' fees until after the term expired at which the order was entered. The record shows that the order for distribution was made in March, 1925, and the original bill in this case was filed in January, 1926.

[illegible] premises had been sold in one of the complainants and the sale confirmed by the court, an order was made for the distribution of the proceeds of the sale. This order was based upon evidence taken upon a re-reference for that purpose and the order directs that $4000 be paid "to Kinsman & Dainson, for solicitors' fees," instead of being based on work in [illegible] of complainant. This was error (Dobbins v. Dorsey, [illegible] 111. 604, 608) apparent on the face of the record.

It is further alleged in the bill that the complainant solicitor Polke employed the defendant Dainson, an attorney, to [illegible] suit for partition of the real estate mentioned, of which he owned an undivided five-eighths interest and also had dower and a homestead estate in the remainder, owned by her three minor children; that no other person had any interest in or claim upon the property; that defendant's firm is named Dainson-[illegible] the pleadings as complainants' solicitors; that the complainant Kathrine Polke relied wholly upon the advice of the defendant Dainson and signed without question all papers and documents he advised her to sign; that in the matter of the allowance of solicitors' fees, defendants, while purporting to act for and represent her, acted secretly and without her notice to her and without her knowledge or approval; that the [illegible] were allowed and paid to them are grossly excessive, and that they did not learn the facts regarding the allowance and payment of solicitors' fees until after the term expired at which the order was entered. The record shows that the order for distribution was made in March, 1898, and the original bill in this case was filed in January, 1899.

The prayer of the second amended bill is that the order of distribution entered in the partition suit be set aside, that the $4000 paid to defendants in pursuance thereof be decreed to be held in trust by the defendants, that "an accounting may be had and taken of the usual, customary and reasonable solicitors' fees for legal services in said partition suit," and that defendants be required to pay over to complainants all sums received by them in excess of whatever amount may be found to be "a proper and reasonable solicitor fee in said proceeding," and for other and further relief.

It is well settled that a bill of review for error apparent on the face of the record may be filed without leave of court; or if the object of the bill is to impeach a decree for fraud in procuring the decree, it may be filed without leave. But it is equally well settled that leave of court must be obtained before the filing of a bill of review upon the ground of newly discovered evidence, and such leave is also necessary where avermants as to errors of law apparent on the face of the record, or charges of fraud in obtaining the decree are joined with allegations of newly discovered evidence. (Glos v. The People, 259 Ill. 332; Harrigan v. County of Peoria, 262 Ill. 36.)

While the bill in this case charges fraud on the part of the defendants, the fraud charged is not the kind of fraud which will sustain a bill in the nature of a bill of review to impeach a decree for fraud. The fraud for which such a bill may be maintained is fraud in respect to the jurisdiction of the court, "which gives a court colorable jurisdiction over the defense presented." (Evans v. Woodsworth, 213 Ill. 404, 407;

The power of the court sworn to hold is that the
[illegible] of distribution entered in the partition suit be set
[illegible]ide, that the $6000 paid to defendants in pursuance thereof
[illegible] directed to be held in trust by the defendants, that "an
[illegible] something may be had and taken of the usual, customary and
[illegible]sonable solicitors' fees for legal services in said partition
[illegible]it," and that defendants be required to pay over to complain-
[illegible]ts all sums received by them in excess of whatever amount may
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[illegible]ained before the filing of a bill of review upon the ground
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[illegible]ere evidence is in error of law apparent on the face of
[illegible] record, or charges of fraud in obtaining the decree are
[illegible]ned with allegations of newly discovered evidence. (Ellis v.
[illegible] Trumbo, 209 Ill. 324; Hutchins v. Dwyer et Ux., 244
[illegible]. 38.)

While the bill in this case charges fraud on the part
[illegible] defendants, the fraud charged is not the kind of fraud
[illegible] will maintain a bill in the nature of a bill of review to
[illegible] a decree for fraud. The fraud for which such a bill
[illegible] be maintained is fraud in respect to the jurisdiction of the
[illegible]rt. "Fraud gives a court collateral jurisdiction over the
[illegible]ame proceeding." (Jones v. Jackson, 232 Ill. 424. 427;

Hintz v. Moldenhauer, 243 Ill. App. 227, 236.) The fraud charged in this bill consists of the alleged concealment of facts from the complainant Katherine Folke, which defendants, as her solicitors, were bound to disclose to her before they assumed to have an order entered in their own favor and, practically, against her. The only theory on which such alleged fraud could be made the basis of a bill in the nature of a bill of review is that complainant did not discover the evidence of the alleged fraud upon her until after the term at which the order complained of was entered; and that is one of the allegations of the second amended bill. It therefore appears that the second amended bill falls within the category of bills in which alleged error on the face of the record and alleged newly discovered evidence are joined as grounds for review by a bill of review. Under the authorities cited, leave of court was necessary before the bill could be filed; and in Harrigan v. County of Peoria, supra, it was held (p. 46) that this objection to the bill can be raised by either demurrer or by motion.

There is a further reason for sustaining the demurrer, not argued in the briefs, but suggested by two recent decisions. In Wilson v. Smart, 324 Ill. 276, it was held that an error in a decree of divorce making a solicitor's fee payable to complainant's solicitor instead of the complainant, cannot be made the subject of a collateral attack, since "the irregularity did not affect the court's jurisdiction to render the decree of divorce;" and in Regner v. Hoover, 318 Ill. 169, 170, which was a bill of review based on alleged error apparent on the face of the record and alleged fraud in procuring the decree, it was

[illegible] v. Mainwaring, 243 III. App. 447, 456.) The issue
[illegible]ved in this bill consists of the alleged concealment of
[illegible]ate from the complainant Katherine Yates, which defendants,
[illegible] her solicitors, were bound to disclose to her before they
[illegible]ssumed to have an order obtained in their own favor and,
[illegible]pitulatively, dismiss her. The only theory on which such
[illegible]lleged fraud could be made the basis of a bill in the nature
[illegible] a bill of review is that complainant did not discover the
[illegible]dence of the alleged fraud upon her until after the term in
[illegible]ich the order complained of was entered and that is one of
[illegible] allegations of the second amended bill. It therefore
[illegible]ears that the second amended bill falls within the authority
[illegible] bills in which alleged errors on the face of the record and
[illegible]lleged newly discovered evidence are joined as grounds for
[illegible]ief by a bill of review. Under the authorities cited, James
[illegible] court was necessary before the bill could be filed; and in
[illegible]tzgerald v. County of Jersey, supra, it was held (p. 49) that
[illegible] objections to the bill can be raised by either demurrer
[illegible] motion.

There is a further reason for sustaining the demurrer,
[illegible] raised in the brief, but suggested by the recent decisions,
[illegible]Gilman v. Tower, 216 Ill. 278, it was held that an error in a
[illegible]ere of divorce making a politician's fee payable be com-
[illegible]ment's solicitor instead of the complainant, cannot be made
[illegible] ground of a collateral attack, since "the irregularity did
[illegible] affect the court's jurisdiction to render the decree of
[illegible]ce," and in Powers v. Kaster, 318 Ill. 168, 170, which was
[illegible]ill of review based on alleged error appearing on the face of
[illegible] record and alleged fraud in procuring the decree, it was

held that "an attack on a decree by a bill of review is collateral," and that "a bill of review cannot be made to function as an appeal or writ of error."

If the fraud charged in the bill is true, undoubtedly, the complainant has her remedy, but it is not to be found in such a bill as the one under consideration. There are other simpler and more effective remedies in such case.

The decree is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

132 - 31262

HOLLAND PRESS, INC.,
a corporation,
Defendant in Error,

v.

J. F. WETHERBY,
Plaintiff in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This writ of error brings up for review the record and judgment of the Municipal court in a first-class case in contract. The action was brought to recover the agreed price or value of certain printing done by the plaintiff. The statement of claim alleges that the defendant, J. F. Wetherby, and three other persons, "doing business as Avalon Beach Company," owed the plaintiff $2002.40 "for labor and services of the plaintiff before then done and bestowed in and about the business of defendants at their special instance and request, as shown on statement hereto attached and marked 'Exhibit A,'" and for goods sold and delivered, "all for agreed prices and fair and reasonable value;" and in the like sum for money found to be due upon an account stated. The attached "Exhibit A" contains twenty-six items, the first of which, dated October 10, 1925, is for "20,000 Prospect Cards #78179, $35," and the last, dated November 18, 1925, is for "400 Business Cards, etc. #78711, $500." There is no allegation in the statement of claim that the amounts so stated (and which aggregate $2002.40) are the "agreed prices," or represent the "fair and reasonable value," of the business cards and other

printed matter specified in "Exhibit A," or referred to in the statement of claim.

Of the four defendants, only the defendant J. F. Wetherby was served. He filed an affidavit of merits which purports to deny, categorically, each of the allegations of the statement of claim. After specifically denying that plaintiff ever did any work, furnished any materials, or sold or delivered any goods to him or to the alleged partnership, or that defendants, jointly or severally, promised "to pay the plaintiff any money whatever," the averment as to "agreed prices" is also specially denied in the following terms: "This affiant has never, either alone or jointly with any other person or persons, agreed upon any price or prices with the said complainant."

It appears from the evidence that the four persons named as defendants are, or were, partners in a real estate venture in Florida involving a tract of land near Pensacola, called "Avalon Beach;" that they engaged the services of one George L. Friestedt, a Chicago real estate broker, to sell their Florida property on commission; that for that purpose he retained the services of a number of other brokers or salesman; that all these brokers were called (or called themselves) "sales managers," except one, named Frain, who was the "sales director;" that Friestedt rented an office in Chicago and did some business under the name of "Avalon Beach Company (Not Inc.);" that either Friestedt or Frain gave all the orders for the printing that was done by plaintiff; that such printing consisted of cards to be used by the "sales managers," daily report cards, introduction cards, vouchers,

letterheads, receipts, contracts, and a forty-four page illustrated prospectus. Friestedt testified that he had a written contract with Wetherby and one of the other defendants as to the sale of the Avalon Beach property, but that contract is not in evidence. He also testified that on October 25, 1925, he showed Wetherby the proofs of some of the printed matter, that Wetherby objected to some of it, but said to "go ahead with it, as it was the proper thing to do," and that after it was done, he, Friestedt, presented plaintiff's bill to Wetherby, who refused to pay it, saying he "was not responsible." There is no evidence of an account stated.

It is contended by defendant that the evidence does not show the value of the printing or that there were any agreed prices; also that no authority is shown on the part of Friestedt or Frain to order any printing for the defendant or for the four defendants who apparently did business under the name of Avalon Beach Company, of Pensacola, Florida. As to the latter question, while there is no direct evidence of any authority from defendant to give such orders in the first instance, there is some evidence from which a ratification of the orders might be inferred. We express no opinion as to the weight of the evidence on that point. Assuming, however, that such ratification was shown, it was nevertheless necessary for the plaintiff to prove that the prices given in "Exhibit A" were either agreed upon or that the printing was reasonably worth the amounts stated in the exhibit. There is no evidence whatever on that subject.

Plaintiff attempts to overcome this objection to the judgment by the contention that the allegation of the statement

letterheads, receipts, envelopes, and a forty-four page illustrated prospectus. Pritchett testified that he had a written contract with Vetterby and one of the other defendants as to the sale of the Avalon Beach property, but that contract is not in evidence. He also testified that on October 22, 1928, he showed Vetterby the proofs of some of the printed matter, that Vetterby objected to some of it, but said to "go ahead with it, as it was the proper thing to do," and that after it was done, he, Pritchett, presented plaintiff's bill to Vetterby, who refused to pay it, saying he "was not responsible." There is no evidence of an account stated.

It is contended by defendant that the evidence does not show the value of the printing or that there were any agreed prices; also that no authority is shown on the part of Pritchett or Frank to enter any printing for the defendant or for the four defendants who apparently did business under the name of "Avalon Beach Company, of Pennsylvania, Florida." As to the latter question, while there is no direct evidence of any authority given entirely to give such orders in the first instance, there is some evidence from which a reviewing court in the proper sight be inferred. We express no opinion as to the weight of the evidence on that point. Assuming, however, that such authorization was shown, it was nevertheless necessary for the plaintiff to prove that the prices given in "Exhibit A" were either agreed upon or that the printing was reasonably worth the amounts stated in the exhibit. There is no evidence whatever on that subject.

Plaintiff attempts to overcome this objection to the judgment by the contention that the allegation of the statement

of claim as to prices and value is not denied by the affidavit of merits, and therefore, under a rule of the Municipal court, was not required to be proved. There are two answers to this. One is that the rule mentioned is not in the record. The other is that even if such a rule exists, the affidavit of merits denies everything that is alleged in the statement of claim, and the denial is sufficiently explicit to require the plaintiff to prove that the amounts claimed to be due were either "agreed prices" or the "fair and reasonable value" of the work done or materials furnished. For the want of such proof in the record, the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

144 - 31274

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. ASCHER TERMINAL THEATRE COMPANY, a corporation, Appellee,	
v.	APPEAL FROM
CITY OF CHICAGO, a Municipal Corporation, WILLIAM E. DEVER, Mayor of the City of Chicago, AL F. GORMAN, City Clerk of the City of Chicago, THOMAS P. KEANE, City Collector of the City of Chicago, and Joseph F. Connery, Fire Commissioner and Chief of Fire Prevention and Public Safety of the City of Chicago, Appellants.	SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This appeal is from an order directing a writ of mandamus to issue commanding defendants to execute and deliver to the relator, Ascher Terminal Theatre Company, a license to maintain and operate a vaudeville and moving-picture theater in the Terminal Theatre building in Chicago, which had been refused because the Chief of Fire Prevention and Public Safety of the city claimed that the use by the relator of certain draperies in the audience room of its theater violates that provision of the Municipal Code of Chicago which reads as follows: "No combustible material other than painted decorations shall be applied to the walls, ceiling or curtain of an audience room in any building of Class IV or V."

It is conceded by the pleadings that the Municipal Code forbids the issuance of such a license until the chief of fire prevention and public safety and other city officials shall first have certified in writing that the room or

[illegible]

[illegible]

[illegible]

place where it is proposed to operate such a theater complies with the city ordinances. It was stipulated that the theater building is a building of Class V and that a number of "drapes" were hung in different places in the "audience room" of the theater. It appears from the evidence that these "drapes" were made of woolen cloth saturated with a chemical solution which makes the cloth "flame-proof." This fireproofing is guaranteed by the manufacturers not to wear off in ten years. A sample of the material so fireproofed was produced in court and a witness applied a lighted match to it, which, he testified, was the test that is usually made. The record shows that counsel agreed in court that in this demonstration, "the material became charred but did not ignite," and the sample so tested, which appears in the record as an exhibit, apparently shows that result.

Another witness, who was a chemical engineer and teacher of industrial chemistry at the Armour Institute of Technology, testified that he had made tests of fourteen samples of the same material at different degrees of temperature, to see whether the material tested would become inflammable or ignite and burn by the prolonged application of heat, and that he afterward subjected the same samples to the flame of a burning match, then to the flame from a city gas main and finally to the flame of a Bunsen burner at a temperature of 2200 degrees Fahrenheit, and that "in no case did the samples of draperies ignite or burn by heat of its own combustion," and that the flame of the Bunsen burner "slowly carbonized the samples, which disintegrated and fell to pieces." He characterized the samples as "fire-resistant" to all "flash fires," and "flame-proof" at the temperatures

indicated. His conclusion was: "In other words, the material is noncombustible."

The chief engineer of the Fire Prevention Bureau of Chicago testified that he did not regard the words "combustible material," as used in the quoted section from the Municipal Code, as including material that "can be made noninflammable by fireproofing," and on cross-examination testified that "the real objection of our office downstairs to the issuance of this license is that we don't consider drapes of any kind in an audience room can comply with the ordinance."

Defendants' counsel insist that the ordinance forbids the use, in the audience room of a theater, of any material which is inherently combustible, even though such material has been made noninflammable or noncombustible by fireproofing it in the manner above described. Petitioner's counsel contend that if any material is used in the audience room which is in fact noncombustible at the time it is used, whether naturally combustible or not, the ordinance is complied with. The trial court evidently took the latter view of it and the record shows that he considered that it was clearly proved by the evidence that the material used by the relator was noncombustible in fact.

Counsel for defendants point to another part of the same section of the Municipal Code which permits the use on the stage of draperies that have been treated with paint or chemical solutions so as to make them "non-inflammable," and argue that if the city council intended that such materials could be used in the audience room, they would have used similar language in the part of the section of the code above quoted. This argument assumes that the city council used the words "inflammable" and "combustible" as having different

intended. His conclusion was: "In other words, the material is combustible."

The chief engineer of the City Purchasing Bureau of Chicago testified that he did not regard the words "combustible material," as used in the quoted section from the Municipal Code, as indicating material that "can be made nonflammable by fireproofing," and an opposite conclusion testified that "the real objection of our office depends on the language of this section in that we don't consider dropping of any kind in an ordinance room can comply with the requirements."

Defendants' counsel insist that the ordinance forbids the use, in the ordinance room of a theater, of any material which is inherently combustible, even though such material has been made nonflammable or noncombustible by fireproofing it in the manner above described. Plaintiffs' counsel contend that if any material is used in the ordinance room which is in fact noncombustible at the time it is used, whether naturally noncombustible or not, the ordinance is complied with. The trial court evidently took the latter view of it and the record shows that he considered that it was clearly proved by the evidence that the material used by the relator was noncombustible in fact.

Counsel for defendants point to another part of the same section of the Municipal Code which provides the use for stage of discussion, that have been treated with paint or chemical solutions so as to make them "non-inflammable," and argue that if the city actually intended that such materials should be used in the ordinance room, they would have used similar language in the part of the section of the code above quoted. This argument assumes that the city council used the words "inflammable" and "combustible" as having different

meanings, while according to the accepted definitions the words are practically synonymous. The ordinances must receive a reasonable construction, and we think the construction contended for is not reasonable. One of Webster's definitions of the word combustible is: "Apt to catch fire," and the fire department engineer used the same definition. The evident purpose of the ordinance was to protect the public against the use of materials in the audience room which would be apt to take fire. It is not shown that this purpose cannot be accomplished as well by the use of materials which have been made fireproof artificially, as by using materials which are inherently fireproof. We agree with the trial court that the evidence clearly shows that the materials in question were noncombustible at the time of the application for the license, and whether that condition of the "drapes" was natural or artificial can make no difference, in our opinion, in the application of the ordinance.

The judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

meanings, while according to the accepted definitions the words are practically synonymous. The ordinances must receive a reasonable construction, and we think the construction contended for is not reasonable. One of defendant's definitions of the word combustible is "Apt to catch fire," and the Fire Department engineer used the same definition. The evidence purport of the ordinance was to protect the public against the use of materials in the audience room which would be apt to cause fire. It is not shown that this purpose cannot be accomplished as well by the use of materials which have been made fireproof artificially, as by using materials which are inherently fireproof. We agree with the trial court that the evidence clearly shows that the materials in question were combustible at the time of the application for the license, and neither that condition of the "fireproof" was natural or artificial can make no difference. In our opinion, in the qualification of the ordinance.

The judgment is affirmed.

AMICKER.

Pridgin, J., d., and Barnes, J., concur.

133 - 31283

HOLCOMB & HOKE MANUFACTURING COMPANY, a corporation, Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
G. C. ROCHE, E. K. ROCHE and T. R. ROCHE, copartners, trading as Roche Bros. Pharmacy, Appellees.	

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This appeal is from a finding and judgment against the plaintiff in an action brought on a promissory note executed and delivered by the defendants to the plaintiff for part of the purchase price of a popcorn machine sold and delivered by the plaintiff to the defendants. The defense was a total failure of consideration.

The evidence is not contradicted. One of plaintiff's salesmen called on the defendants at their drug store in Chicago to sell them a popcorn machine. Defendants were interested and asked the salesman whether, on account of the zoning laws or anything of that character, it was necessary to have a permit to operate the machine on the sidewalk, saying that they had no room in the store, but must operate it outside. The salesman said he understood a permit was necessary but he would ascertain. Soon after, he returned with the plaintiff's sales manager, one Kirkland, who told defendants he "had been down to the permit department and found out we could get a permit out there," whereupon defendants gave Kirkland their written order, on a blank form for a machine to cost $597.50, payable $75 down and

HOLCOMB & HOWE MANUFACTURING COMPANY, a corporation,
Appellant,

v.

G. G. HOWE, E. E. HOWE and G. S. FOSTER, copartners, trading as Howe Bros. Hardware,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This appeal is from a finding and judgment against the plaintiff in an action brought on a promissory note executed and delivered by the defendants to the plaintiff for part of the purchase price of a popcorn machine sold and delivered by the plaintiff to the defendants. The defense was a total failure of consideration.

The evidence is not contradicted. One of plaintiff's salesmen called on the defendant at their drug store in Chicago to sell them a popcorn machine. Defendants were interested and asked the salesman whether, on account of the existing laws or anything of that character, it was necessary to have a permit to operate the machine on the sidewalk, saying that they had no room in the store, but must operate it outside. The salesman said he understood a permit was necessary but he would ascertain. Soon after, he returned with the plaintiff's sales manager, one Kirkham, who told defendants he "had been down to the permit department and found out we could get a permit out there," whereupon defendants gave Kirkham their written order, on a blank form for a machine to cost $297.50, payable $75 down and

the remainder to be evidenced by their note for $522.50 payable in specified monthly payments, secured by a chattel mortgage on the machine. Neither the written contract nor the note says anything about a permit. The machine was delivered to defendants and used about two weeks when their use of it was stopped by the police. Thereupon they made an application for a permit, which was refused on the ground that defendants' drug store was "in a residential district." It appears further that there is an ordinance of the city of Chicago which makes it unlawful to maintain upon any public sidewalk in the city "any fruit stand, lunch wagon * * box, bin, show case, platform or any other arrangement or structure for the display or sale of goods, wares or merchandise" unless a permit for the same shall first be obtained from the commissioner of public works. It also appears that as soon as defendants learned they could not get a permit, they tendered back the popcorn machine, and when plaintiff refused to receive it, sent word that it was held subject to the order of the plaintiff. It has never been used since that time.

Plaintiff states that "the principal error upon which this appeal is based is the admission by the court of evidence in support of the alleged oral agreement, which contradicts the written contract of the parties hereto, and the acceptance by the court of such alleged oral agreement as the true agreement of the parties." There was no error in admitting such evidence or in accepting the uncontr dicted statement that there was an oral agreement which is not contained in the note or the written contract. The statutes of this state expressly permit this defense to be made. (Cahill's Stat., Chap. 98, Par. 10,

entitled "Negotiable Instruments.")

In Great Western Ins. Co. v. Rees, 29 Ill. 272, an action was brought on a promissory note which stated on its face that the consideration was "for the sale of a lease" of an office on South Water street, Chicago. The defendant filed a special plea alleging, in substance, that most of the consideration for the note was a pretended sale of the good will of the business of an insurance company which that company afterwards wrongfully refused to permit them to use or enjoy, whereby defendants lost the whole value of such good will and the consideration of the note to that extent failed. The court held that under the statute above mentioned "the door is necessarily thrown wide open to disclose the whole truth about the consideration," and that it was competent for the defendant to plead and prove that the note sued on was given, not for the sale of the lease of the office mentioned as stated in the note, but for the good will of the insurance company, and if such good will was worth anything and was the true consideration of the note and the defendant did not receive it, he was entitled to a reduction to that extent in the recovery against him. The court said: "It is impossible that this statute can be made effective in any other way than by receiving such proofs; and in receiving them, the old rule, that written contracts cannot be varied by parol, becomes, in all such cases, ineffective." To the same effect are the cases of Morgan v. Fallenstein, 27 Ill. 31, 32; Gage v. Lewis, 68 Ill. 604; Mann v. Dwyer, 76 Ill. 365; Wolf v. Fletemeyer, 83 Ill. 420; Taft v. Myerscough, 197 Ill. 600, and Babo v. Nimett, 178 Ill. App. 459. The same rule has been applied where the alleged failure of consideration consisted of the failure of the article or thing, for the

[illegible] "negotiable instruments.")

In Lewis [illegible] Co. v. Lynn, 69 Ill. 474, an [illegible] was brought on a promissory note which stated on its face that the consideration was "for the note of a house" at [illegible] on South Water street, Chicago. The defendants filed a special plea alleging, in substance, that most of the consideration for the note was a pretended sale of the good will of the business of an insurance company which that company fraudulently returned to permit them to use or enjoy. Thereby defendants lost the whole value of such good will and the consideration of the note to that extent failed. The court held that under the statute above mentioned "the door is necessarily thrown wide open to disclose the whole truth about the consideration," and that it was competent for the defendants to plead and prove that the note sued on was given, not for the goods of the house of the writer mentioned as stated in the note, but for the good will of the insurance company, and if such good will was worth nothing and was the true consideration of the note and the defendant did not receive it, he was entitled to a reduction to that amount in the recovery against him. The court said: "It is impossible that this dispute can be made effective in any other way than by receiving such proofs and by receiving them, the old rule, that written contracts cannot be varied by proof, becomes, in all such cases, ineffective." To the same effect are the cases of Burgess v. Fitzhugh, 47 Ill. 32; Ryan v. Lynch, 48 Ill. 474; Shay v. Thayer, 78 Ill. 189; Tait v. Fitzsimmons, 80 Ill. 219; Tait v. Fitzsimmons, 87 Ill. 499, and Hahn v. Mimmis, 178 Ill. App. 499. The same rule has been applied where the alleged failure of consideration consisted of the failure of the article or thing, for the

purchase or payment of which the note was given, to comply with some stipulation, agreement or representation made by the seller to the buyer. (Beers v. Williams, 16 Ill. 69; Bryant v. Sears, 16 Ill. 288; Marsh v. Bennett, 22 Ill. 313; Oertel v. Schroeder, 48 Ill. 133; Jones v. Buffum, 50 Ill. 277.)

As this is the only alleged error discussed in plaintiff's briefs, the judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

17 - 30951

E. L. SCHEIDENHELM COMPANY, a corp., Appellee, v. DOLESE BROS. CO., a corp., Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed April 6, 1927

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On September 18, 1920, Dolese Bros. Co., the defendant, sent a written proposal to E. L. Scheidenhelm Company, the plaintiff to sell and ship to it approximately 15,000 cubic yards of crushed stone from Buffalo, Iowa to Whitton, Illinois, at $2.83 per net ton.

Pertaining to the freight rate and how it should be determined and paid, the written proposal contained the following:

> "We understand the present freight rate is $1.68 per ton, and our selling price is based on this rate, if the freight rate is greater you are to deduct only freight on the basis of above rate, should the rate be less, we will allow you the difference in the freight rate in addition to the full amount of freight charges."

It also contained the following:

> "Prices are f.o.b. cars C.B.& Q.R.R. delivery at Whitton, Illinois," and
> "Freight charges to be paid by you and original paid freight bills to be sent us promptly for credit."

Opinion filed April 6, 1927

MR. PRESIDING JUSTICE FARAH delivered the opinion of the court.

On September 18, 1920, Dates Exp. Co., the intervenor, sent a waiver proposal to E. L. Bohlenkamp Company, the plaintiff in all and ship to it approximately 15,000 cubic yards of crushed stone from Zurich, Iowa to Milton, Illinois, at $2.02 per net ton.

Pertaining to the freight rate and how it should be determined and paid, the waiver proposal contained the following:

> "To determine the lowest freight rate is $1.00 per ton, and our selling price is based on this rate, if the freight rate is greater you are to deduct only freight on the basis of above rate, should the rate be less, we will allow you the difference in the freight rate in addition to the full amount of freight charge."

It also contained the following:

> "Prices are f.o.b. cars S.W.A C.R.I. delivery at Milton, Illinois." and
> "Freight charges to be paid by you and original paid freight bills to be sent us promptly for credit."

On November 2, 1920, the plaintiff wrote to the defendant requesting it to proceed to ship five cars per day of the stone until further notice. In that letter the plaintiff stated, "We understand at present freight rates, the price is $2.83 per ton delivered at Whitton."

Pursuant to that proposal and acceptance, the defendant delivered to the plaintiff about 75 cars of stone, on which, through some mistake, the railroad freight was charged at the rate of $2.70,(and which the plaintiff paid) instead of $1.68 per ton.

On December 27, 1920, the defendant wrote to the plaintiff as follows:

> "Confirming telephone conversation with your Mr. Cassit, we wish to advise that both C.B. & Q. and C.R.I. & P. Ry. people today advised us on 'phone that the correct rate on crushed stone carloads from Buffalo, Iowa to Whitton, Illinois is $1.68 per net ton. This rate is carried in C.R.I.& P. Tariff No. 31324 - ICC 10403, item No. 938 and CB&Q. Concurrence No. 6457-J. By referring to our quotation you will note the freight allowance agreed upon was $1.68 per net ton; therefore, if you will make a charge against this company on the basis of $1.68 per net ton and submit all your freight bills we will be only too glad to take the matter up with the C.B.&Q. Ry. with a view of obtaining a refund, as we roughly estimate about seventy-five (75) cars and probably at about $50.00 a car which would amount to something around $3,000.00.
>
> "Upon receipt of this check we will either endorse your account, or upon your approval we will credit your account with such refund through claim as we may receive."

The plaintiff having paid the freight charges to the railroad at the rate of $2.70 per net ton, made a claim against the railroad for the difference between $1.68 and $2.70 per ton, and as a result, the amount of

On November 8, 1960, the plaintiff wrote to the defendant requesting it to proceed to ship five cars per day of the stone until further notice. In that letter the plaintiff stated, "It understand at present freight rates, the price is $8.00 per ton delivered at Milton."

Pursuant to that request and arrangement, the defendant authorized to the plaintiff about 75 cars of stone, on which, through some mistake, the railroad freight was charged at the rate of $2.70,(and which the plaintiff paid) instead of $1.25 per ton.

On December 27, 1960, the defendant wrote to the plaintiff as follows:

> "Quoting telephone conversation with your Mr. Gould, we wish to advise that the G.N. & G. and C.N.I. & P. Ry. people today advised us on phone that the matter was re-opened when original tran bulletin, low to Milton, filling in $1.25 per ton, this rate is correct to C.N.I.& P. Ry. Milton - low level, then on, $2.70 and then, connection on Ry.-d. By returning to our connection you will note the freight allowance agreed upon was $1.25 per ton therefore, if you will make a claim against this company for the rate of $1.25 per ton not $2.70 - all your freight bills we will be only too glad to take the matter up with the C.N.R. or with a view of obtaining a refund, as we already estimate about twenty-five (25) more car loads only at about 150,000 per which would amount to something around $1,000.00.
>
> Upon receipt of this check we will gladly endorse your account, or upon your approval we will credit your account with such refund claim as we may receive."

The plaintiff having paid the freight charges to the railroad at the rate of $2.70 per ton, made a claim against the railroad for the difference between $1.25 and $2.70 per ton, and as a result, the amount of

the excess charges was ultimately paid to the plaintiff.

Subsequently, proceedings were instituted before the Interstate Commerce Commission, whereby, as stated in the plaintiff's statement of claim, and not denied in the defendant's affidavit of merits, the Interstate Commerce Commission, on December 8, 1924, granted a reduction in the rate, or tariff, from $1.68 per net ton, to a price of $1.10 per net ton, and pursuant thereto, on December 24, 1924, the defendant was paid the sum of $2324.03, that is, the amount which, together with interest, the plaintiff now claims is due it from the defendant.

There was a trial before the court, with a jury, and at the close of all the evidence, the court instructed the jury to find the issues against the defendant, and assess the plaintiff's damages at $2440.23. Pursuant thereto, there was a verdict and judgment. This appeal is from that judgment.

The only controversy of substance , as stated by counsel for the defendant in their brief, pertains to the interpretation of the words quoted above, that is,

> "We understand the present freight rate is $1.68 per ton, and our selling price is based on this rate, if the freight rate is greater you are to deduct only freight on the basis of above rate, should the rate be less, we will allow you the difference in the freight rate in addition to the full amount of freight charges."

and whether the words, "the present freight rate," and "the freight rate," mean the freight rate as allowed by

the excess charge was ultimately paid to the plaintiff.

Subsequently, proceedings were instituted before the Interstate Commerce Commission, whereby, as stated in the plaintiff's statement of claim, and not denied in the defendant's affidavit of merits, the Interstate Commerce Commission, on December 8, 1944, granted a reduction in the rate, or tariff, from $1.88 per ton, to a rate of $1.10 per ton, and provided therefor, on January 24, 1945, the refund was paid the sum of $[illegible], plus interest with interest, the plaintiff now claims is due it from the defendant.

There was a trial before the court, with a jury, and at the close of all the evidence, the court instructed the jury to find the issues against the defendant, and assess the plaintiff's damages at $[illegible]. Pursuant thereto, there was a verdict and judgment. This appeal is from that judgment.

The only controversy of substance, as stated by counsel for the defendant in their brief, pertains to the interpretation of the words quoted above, that is,

> "We understand the present freight rate is $1.88 per ton, and our railway rates is based on this rate. If the freight rate is greater you are to deduct only freight on the basis of above rate. Should the rate be less, we will allow you the difference in the freight rate in addition to the full amount of freight charges."

and whether the words, "the present freight rate," and "the freight rate," mean the freight rate as limited by

the decision of the Interstate Commerce Commission, that is, $1.10 per ton, or the published tariff rate then existing, that is, $1.68 per ton.

As counsel for the defendant say, the pleadings themselves make that the sole issue.

The defendant called several expert witnesses, and catechised them, in an effort to prove that the word "refund" meant, in dealing with rates that were collected under published tariffs, a repayment of sums collected upon tariffs which were in excess of the true published tariff; that the word "reparation" and the word "reduction" related to the awards made by the Interstate Commerce Commission in proceedings instituted by shippers and consignees who obtained a finding and judgment or decision that rates were in excess of lawful rates, and were unreasonable at the time and place.

The trial judge refused to permit the introduction of such evidence.

It was the evidence of one Bryan, a traffic manager, who it was admitted was an expert on tariff matters pertaining to railroads, that a published tariff is a publication issued by railroads, setting forth the freight rate upon which they would transport freight between given points; that it is a lawful document on file with the Interstate Commerce Commission or State Railroad Commission and is binding upon the carrier, consignee and consignor; that the correct tariff rate in effect on carloads of crushed stone at the time and place in question was $1.68

the opinion of the Interstate Commerce Commission, but is, $2.50 per ton, or the published tariff rate then existing, that is, $2.00 per ton.

As counsel for the defendant say, the plaintiffs themselves must bear the main issue.

The defendant called several expert witnesses, and established then, in an effort to prove that the word "reduced" means, in dealing with rates that were collected under published tariffs, a repayment of sums collected upon tariffs which were in excess of the true published tariff; that the word "remission" and the word "reduction" related to the awards made by the Interstate Commerce Commission in proceedings instituted by shippers and consignees who obtained a finding and judgment or decision that rates were in excess of lawful rates, and were unreasonable at the time and place.

The trial judge refused to permit the introduction of such evidence.

It was the evidence of one expert, a traffic manager, who it was claimed was an expert in tariff matters pertaining to railroads, that a published tariff is a publication issued by railroads, setting forth the freight rate upon which they would transport freight between given points; that it is a lawful document on file with the Interstate Commerce Commission or State Railroad Commission and is binding upon the carrier, consignee and consignor; that the correct tariff rate is effect on carloads of crushed stone at the time and place in question was $1.25

per ton.

Bryan was asked whether in September, 1930, there was a meaning to be attached to the words, "the present freight rate," as understood by shippers generally, those accustomed to the business of shipping. That was objected to on behalf of the plaintiff, and the objection sustained. The defendant then offered to show that the words, "the present freight rate" were generally known and understood and accepted by all shippers to mean the published tariffs. The offer was refused by the court.

We have difficulty in understanding how there can arise in the mind any doubt as to the meaning of the words in the paragraph in question. By the contract of the parties, it is obvious that the seller was providing that it should get net, an amount equal to the difference between $2.83 and $1.68, that is, $1.15 per ton free of any charges for freight. The paragraph in question was put in as a simple formula prescribing not only that the freight rate of $1.68 per ton, with a gross price of $2.83 per ton should be paid by the purchaser, which would leave the seller net $1.15 per ton, but also, in case of the freight rate being something else than $1.68 per ton, it would be charged, as between them, against one or the other in such a way that the ultimate result would be that the seller would receive net $1.15 per ton.

In L.& N.R.R. v. Sloss-Sheffield Co., 269 U.S. 217, the plaintiff, the Sloss-Sheffield Co., brought suit against the defendant railroad for the amount of a reparation order entered by the Interstate Commerce Commission for

part thereof.

Upon the usual motion in arrest, 1941, there was a meaning to be attached to the words, "the present freight rate," as contained by shippers generally, those concerned to the business of shipping. That was objected to on behalf of the plaintiff, and the objection sustained. The defendants then offered to show that the words, "the present freight rate" were generally known and understood and accepted by all shippers to mean the published tariff. The offer was refused by the court.

We have difficulty in understanding how there can arise in the mind any doubt as to the meaning of the words in the paragraph in question. By the contract of the parties, it is obvious that the meter was providing that it should get not, as nearly equal to the difference between $1.25 and $1.50, that is, $1.38 per ton from of superphosphate for freight. The paragraph in question was put in as a simple formula providing not only that the freight rate of $1.50 per ton, with a gross price of $5.25 per ton should be paid by the purchaser, which would leave the meter net $1.38 per ton, but also in case of the freight rate being something else than $1.50 per ton, it would be changed, as between them, against one or the other in such a way that the ultimate result would be that the meter would receive net $1.38 per ton.

In Ind A.S.A. v. Grove-Hatfield Co., 242 U.S. 227, the plaintiff, the Grove-Hatfield Co., brought suit against the defendant railroad for the amount of a reparation order entered by the Interstate Commerce Commission

excessive freight charges, and obtained a judgment. The claim was made that the Sloss-Sheffield Co. could not recover because it was not damaged by any excessive freight charges, but as to that, the court held that the consignor had the right to sue. The court, however, inasmuch as the suit was against the carrier, stated, "With the rights or equities as between seller and purchaser it had and has no concern, nor need we concern ourselves with them." In that case, the court passed upon the phraseology of the contract, which contract after stating that the price of the merchandise was $14.85 per ton, delivered at Chicago, contained the following:

> "This price is based on present tariff freight rate of $4.35 per ton. In case the tariff rate declines, the buyer is to have the benefit of such decline. In case the tariff freight rate advances, the buyer is to pay the advance."

After stating that the provision in question was a common one in contracts of sale, it was held that the consignor must sue if goods were sold f.o.b. destination. The court further said:

> " The Louisville & Nashville argues now that a sale at the delivered price of $14.85 is, by reason of this provision, the legal equivalent of a sale at $10.50 plus freight; that under a contract of sale at a fixed price plus freight the purchaser would be entitled 'in case the tariff rate declines' to the benefit of 'the decline'; that a decision that a published rate exacted was excessive is the legal equivalent of a decline in rates; that under the provision quoted the purchaser would be entitled, as against the seller, to any damages payable by the carrier for having established and collected the higher tariff rate thereafter found to be unlawful because excessive; and that, since the refund to be made by the carrier would ultimately enure to the purchaser's benefit, no damage was suffered by the seller by

excessive freight charges, and obtained a judgment. The claim was made that the Glass-Sheffield Co. could not recover because it was not damaged by any excessive freight charges, but as to that, the court held that the consignor had the right to sue. The court, however, in commenting on the suit was against the carrier, stated, "with the rights or equities as between seller and purchaser it had and has no concern, nor need we concern ourselves with them." In that case, the court placed upon the phraseology of the contract, which contained after stating that the price of the merchandise was $14.50 per ton, delivered at Chicago, contained the following:

> "This price is based on present freight rates, at $4.25 per ton. In case the freight rate decline, the buyer is to have the benefit of such decline. In case the freight rates advance, the buyer is to pay the difference."

After stating that the provision in question was a common one in contracts of sale, it was held that the consignee was if good was sold f.o.b. destination. The court further said:

> "The Indianapolis & Northern argument was that a sale at the delivered price of $14.50 is, by reason of this provision, the legal equivalent of a sale at $12.50 plus freight; that under a contract or sale at a fixed price plus freight the purchaser would be entitled to have the benefit of the decline; that the benefit of the decline, that a decline that a subsequent rate reduced exclusive in the legal entitlement of a seller in rates; that under the provision (when the purchaser would be entitled, to protect the seller, to any damages payable by the seller for having established and collected the higher tariff rate; whether found to be unlawful because excessive; and that, alone the rates to be made by the carrier would ultimately enure to the purchaser's benefit, no doubt was entertained by the seller of

reason of the excessive freight charge.

The construction urged ignores the commercial significance of selling at a delivered price. When a seller enters a competitive market with a standard article he must meet offerings from other sources. On goods sold f.o.b. destination, the published freight charge from the point of origin becomes, in essence, a part of the seller's cost of production. An excessive freight charge for delivery of the finished article affects him as directly as does a like charge upon his raw materials. Moreover, the burden of the published freight rate rested upon the consignor under the bill of lading, Louisville & Nashville R. R. Co. v. Central Iron & Coal Co., 265 U.S. 59, 67, as well as under the contract of sale. The purchaser who paid the freight did so solely as agent for the seller. The carrier did not know of the provision in the sales contracts. With the rights or equities as between seller and purchaser it had and has no concern, nor need we concern ourselves with them."

In the instant case, it is not denied that the amount of the overcharge for freight was paid by the carrier to the defendant, and that the only question to be decided here pertains to the rights or equities as between seller and purchaser. As to the meaning of the words in the particular paragraph of the contract of sale in question, we think they should be interpreted the same way as similar words were interpreted in the L. &N. R.R. case. Considering, therefore, as we do, that the words have a simple, easily understood meaning, and that the interpretation was a matter of law for the court, we are of the opinion that the court did not err in its construction of the contract, nor in ruling on evidence offered by the defendant.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

reason of the excessive freight charge.

The contention urged ignores the commercial slightness of selling at a delivered price. When a seller states a competitive market a standard article he must meet competition from other sources. In goods sold f.o.b. destination, the published freight charge from the point of origin becomes, in essence, a part of the seller's cost of production. An excessive freight charge for delivery of the finished article affects his as directly as does a like charge upon his raw materials. However, the burden of the published freight rate rested upon the consignor under the bill of lading. (Louisville & Nashville v. U. Co. v. Central Iron & Coal Co., 226 U.S. 59, 67, as well as under the contract of sale. The purchaser who paid the freight did so solely as agent for the seller. The carrier did not have of the transaction in the sales commerce. With the rights or equities as between seller and purchaser it had and has no concern, nor need we concern ourselves with them.'

In the instant case, it is not denied that the amount of the overcharge for freight was paid by the carrier to the defendant, and that the only question to be decided here pertains to the rights or equities as between seller and purchaser. As to the meaning of the words in the particular paragraph of the contract of sale in question, we think they should be interpreted the same way as similar words were interpreted in the L. &N. R.R. case. Considering, therefore, as we do, that the words have a simple, easily understood meaning, and that the interpretation are a matter of law for the court, we are of the opinion that the court did not err in its construction of the instrument, nor in ruling on evidence offered by the defendant.

Finding no error in the record, the judgment is affirmed.

Affirmed.

Crawford, J. not participating.

66-31190

BERNARD W. SNOW, for the use of JAMES FLYNN, Defendant in Error, vs. LYON & HEALY, a corporation, and M. A. HEALY, Plaintiffs in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

Opinion filed April 6, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is a suit by Bernard W. Snow, for the use of James Flynn, the plaintiff, in the Municipal Court, against Lyon & Healy, and M. A. Healy, the defendants, on a replevin bond. The cause was tried before the court, without a jury, and there was a finding and judgment in favor of the plaintiff against the defendants in the sum of $400.00 and costs. To reverse that judgment, the defendants have prosecuted this writ of error.

It is urged in the affidavit of merits in this case that the original replevin suit above referred to was not tried on the merits, but that they, Lyon & Healy, were forced to take a nonsuit, owing to the absence of a material witness. Lyon and Healy having taken the player piano on a replevin writ in a former suit and given bond, which is here sued upon, and having taken a nonsuit in the former case, and the piano not being returned to James Flynn, from whom it was taken on the writ, it is now claimed, by way of defense, that the title to the piano remained throughout in Lyon & Healy, and

BERTRIS E. [illegible], for the use of JAMES FLYNN,	
Ind-ebtor in Error,	Writ of Error
Vs.	
LYON & MOLLY, a partnership, and E. A. MOLLY,	
Plaintiffs in Error.	

Opinion filed April 6, 1927.

Mr. PRESIDING JUSTICE DUNN delivered the opinion of the court.

This is a suit by Bertris E. Flynn, for the use of James Flynn, the plaintiff, in the municipal court, against Lyon & Molly, and E. A. Molly, the defendants, on a replevin bond. The county was tried before the court, without a jury, and there was a finding and judgment in favor of the plaintiff against the defendants in the sum of $600.00 and costs. To reverse that judgment, the defendants have prosecuted this writ of error.

It is urged in the affidavit of merits in this case that the original replevin suit above referred to was brought on the merits, but that they, Lyon & Molly, were forced to take a nonsuit, owing to the absence of a material witness. Lyon and Molly having taken the player piano on a replevin writ in a former suit and given bond, which is here sued upon, and having taken a nonsuit in the former suit, and the piano not being returned to James Flynn, from whom it was taken on the writ, it is now claimed, by way of defense, that the title to the piano remained throughout in Lyon & Molly, and

never passed to either the original purchaser, Stella R. Tune, or to one Frank Tyrack, to whom she gave a bill of sale for the piano, or to James Flynn, to whom Frank Tyrack gave a bill of sale.

There is no particular conflict in the evidence as to the history of the title of the piano. It was bought on October 11, 1921, by Stella R. Tune from Lyon & Healy, for $450.00, and she gave to Lyon & Healy at that time a note in that amount, payable in installments of $15.00 on the fifteenth day of each month thereafter. On the face of the note there was a clause, in part, as follows:

> "The sale of said instrument is made and this note is taken upon the express condition that I shall obtain no title to or ownership of said instrument unless and until the said indebtedness shall have been fully paid, and that the title to and ownership of said instrument remains and shall remain with said Lyon & Healy, Inc., and said instrument subject to their order so long as any part of that indebtedness remains unpaid; and it is expressly agreed that in case of any default in the payment of any installment of interest as it matures, or in case I shall incumber or remove said instrument from my present residence without their written consent, then in any of such cases they shall have the right to take possession of said instrument, and also a right to declare all of said indebtedness due and payable at once, and to retain any money I may have paid them as rental or compensation for the use of said instrument.* * * I will keep the instrument insured in a good company at my expense for their benefit."

Sometime in the winter of 1923, or the early part of 1924, one Graves, credit manager for Lyon & Healy, after talking to Stella R. Tune about her account, which she stated she knew all about, suggested that she sign a new note, and, as she told him she was ill and could not come in, he mailed the note out to her, and she signed it. He testified that he compared the signature with the signature on the first note, and that it was apparently all right, and he accepted it as such.

never passed to either the original purchaser, Stella R. Tuma, or to one Frank Tyrack, to whom she gave a bill of sale for the piano, or to James Flynn, to whom Frank Tyrack gave a bill of sale.

There is no particular contact in the evidence as to the history of the title of the piano. It was bought on October 11, 1923, by Stella R. Tuma from Lyon & Healy, for $480.00, and she gave to Lyon & Healy at that time a note in that amount, payable in instalments of $15.00 on the fifteenth day of each month thereafter. On the reverse of the note there was a clause, in part, as follows:

"The sale of said instrument is made and this note is taken upon the express condition that I shall obtain no title to or ownership of said instrument until and until the said indebtedness shall have been fully paid, and that the title to my ownership of said instrument remains and shall remain with said Lyon & Healy, Inc., and said instrument subject to their order so long as any part of that indebtedness remains unpaid; and it is expressly agreed that in case of any default in the payment of any instalment of interest as it matures, or in case I shall remove or remove said instrument from my present residence without their written consent, then in any of such cases they shall have the right to take possession of said instrument, and also a right to declare all of said indebtedness due and payable at once, and to retain any money I may have paid thereon as rental or compensation for the use of said instrument. * * * I will keep the instrument insured in a good company at my expense for their benefit."

Sometime in the winter of 1928, or the early part of 1929, one Graves, credit manager for Lyon & Healy, after talking to Stella R. Tuma about her account, which she stated she kept all right, suggested that she sign a new note, and as the fair lady was ill and could not come to, he called the note out to her, and she signed it. He testified that he compared the signature with the signature on the first note, and that it was apparently all right, and he returned it as usual.

There was offered in evidence for the defendants, the note of October 11, 1921; also a note dated February 18, 1924, for $356.82, which recites that it is for a Washburn Player Piano. It contains similar provisions, as to the title of the property remaining in Lyon & Healy, to those in the above mentioned note of October 11, 1921.

The record shows that upon objections being made by counsel for the plaintiffs, the court ruled them to be inadmissible.

There was also offered in evidence what purported to be a bill of sale, dated November 27, 1924, by Stella R. Tune and her husband, for a consideration of $490.00, of certain personal property to one Frank Tyrack. The first item, being the property described, is given as one piano player. That bill of sale contains after a recitation of the items of personal property, the following:

> "All of the above being subject to incumbrances as follows: Balance due Lyon and Healy on aforementioned Player Piano and Rolls $300."

The bill of sale showed that it was acknowledged before a notary public, and contained the endorsement that it was filed of record December 16, 1924, in the Recorder's Office of Cook County.

Upon objection by counsel for the plaintiffs, the trial court refused to admit in evidence the bill of sale just referred to.

In our judgment, the two notes should have been admitted in evidence, all of which were certainly sufficiently identified to justify their admissibility.

There was offered in evidence for the defendants, the note of October 11, 1921; also a note dated February 13, 1924, for $1500.00, which recites that it is for a Kaibourn Player piano. It contains similar provisions, as to the title of the property remaining in Lyon & Healy, to those in the above mentioned note of October 11, 1921.

The record shows that upon objections being made by counsel for the plaintiffs, the court ruled them to be inadmissible.

There was also offered in evidence that purported to be a bill of sale, dated November 27, 1924, by Stella A. Tuse and her husband, for a consideration of $500.00, of certain personal property to one Frank Tyrone. The first item, being the property described, is given as one piano player. That bill of sale contains after a recitation of the items of personal property, the following:

"All of the above being subject to incumbrances of follows: Balance due Lyon and Healy on aforementioned player piano and bills $300."

The bill of sale showed that it was acknowledged before a notary public, and contained the endorsement that it was filed of record December 16, 1924, in the Recorder's office of Lake County.

Upon objection by counsel for the plaintiffs, the trial court refused to admit in evidence the bill of sale just referred to.

In our judgment, the two notes should have been admitted in evidence, all of which were certainly sufficiently identified to justify their admissibility.

Also, there appears in the record a bill of sale, dated February 24, 1925, from Frank Tyrack to James Flynn: "1 Player piano Washburn, #22969," together with certain other items of personal property. The consideration mentioned is $400.00.

One Graves, credit manager of Lyon & Healy, testified, when asked if he had anything to do with the Washburn Player Piano, No. 22909 account, that he had something to do with all of them at the time he was there, and it further appears from his testimony that that was the piano involved in the account of Mrs. Tuns.

It is the testimony of one Mareen, an outside investigator employed by Lyon & Healy, that in June or July, 1925, he visited James Flynn in his flat at 3815 West Monroe Street, and that the following colloquy took place:

"A I said, 'I understand you have one of Lyon & Healy's pianos.' He said, 'Yes, I have.' I says, 'Where did you get it from?' He said, 'I bought it from a man by the name of Tyrack.'
Q. What did you say then?
A. I said, 'Do you know that that piano, there has an encumbrance of $300.00 on it to Lyon & Healy?' He said, 'No, I don't. I got a bill of sale from Tyrack for some goods I bought from him and I understood the piano was paid for.' I said, 'Well, it isn't, it belongs to Lyon & Healy.' And I made a demand for the piano.
Q What did he say?
A He said, 'You can't have it, and if you come back, I don't want you to come here again, as fast as you come back again I'll throw you out.' That is all there was to it."

We think the evidence amply identifies the player piano

Also, there appears in the record a bill of sale, dated February 24, 1933, from Frank Tyrack to James Flynn: "1 player piano Mashburn, #22222," together with certain other items of personal property. The consideration mentioned is $200.00.

One Graves, credit manager of Lyon & Healy, testified, when asked if he had anything to do with the Mashburn player piano, no. Being accused, that he had something to do with all of them at the time he was there, and it further appears from his testimony that that was the piano involved in the account of Mrs. Tuma.

It is the testimony of one Keteen, an outside investigator employed by Lyon & Healy, that in June or July, 1933, he visited James Flynn in his flat at 3818 West Monroe Street, and that the following colloquy took place:

"A I said, 'I understand you have one of Lyon & Healy's pianos.' He said, 'Yes, I have.' I says, 'Where did you get it from?' He said, 'I bought it from a man by the name of Tyrack.'

Q. What did you say then?

A. I said, 'Do you know that that piano, there has an encumbrance of $200.00 on it to Lyon & Healy?' He said, 'No, I don't. I got a bill of sale from Tyrack for some proof I bought from him and I understood the piano was paid for.' I said, 'Well, it isn't, it belongs to Lyon & Healy.' And I made a demand for the piano.

Q. What did he say?

A. He said, 'You can't have it, and if you come back, I don't want you to come here again, as fast as you come back again I'll throw you out.' That is all there was to it."

To this the evidence amply identifies the player piano

in possession of Flynn as the same piano which was bought by Stella R. Tune; that is, considering not only the testimony which was given, but the contents of the exhibits which were ruled out.

In the brief and argument for the plaintiffs, it is stated that the evidence which was submitted, the arguments of counsel, and the remarks of the court, all clearly show that the only question at the trial was whether Lyon & Healy had an interest in the piano which was replevined. Considering that the issue, we are of the opinion that the trial court erred in that it was manifestly against the weight of the evidence to hold that it was not sufficiently shown that the piano in question was the one which Lyon & Healy had sold to Stella R. Tune.

We are, therefore, of the opinion that the plaintiff was entitled to recover only nominal damages. Lyon & Healy v. Pease, for use, etc., 86 Ill. App. 251. The judgment is reversed and judgment for nominal damages of $1.00 is entered in this court, in favor of the plaintiff, who is to pay the costs here.

REVERSED AND JUDGMENT HERE.

O'CONNOR AND THOMSON, JJ. CONCUR.

in possession of Flynn as the same piano which was bought by Stella R. Tyme; that is, considering not only the testimony which was given, but the comments of the exhibits which were taken out.

In the brief and argument for the plaintiffs, it is stated that the evidence which was submitted, the arguments of counsel, and the remarks of the court, all clearly show that the only question at the trial was whether Lyon & Healy had an interest in the piano which was replevined. Considering that the issue, we are of the opinion that the trial court erred in that it was manifestly against the weight of the evidence to hold that it was not sufficiently shown that the piano in question was the one which Lyon & Healy had sold to Stella R. Tyme.

We are, therefore, of the opinion that the plaintiff was entitled to recover only nominal damages. Lyon & Healy v. Frank, for use, etc., 86 Ill. App. 683. The judgment is reversed and judgment for nominal damages of $1.00 is entered in this court, in favor of the plaintiff, who is to pay the costs here.

REVERSED AND JUDGMENT ENTER.

O'CONNOR AND THOMAS, JJ. CONCUR.

103 - 31232

F.E. NELLIS & CO., a corp., Appellant, v. THE YAKIMA FRUIT & COLD STORAGE CO., a corp., Defendant, FIRST NATIONAL BANK OF YAKIMA, a corp., Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed April 6, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On October 31, 1925, the plaintiff, F. E. Nellis & Co., a corporation, began suit in the Municipal Court against The Yakima Fruit & Cold Storage Company, a corporation for $5,000.00, and on the same day filed a statement of claim, containing, in part, the following allegations:-

That on June 26, 1925, at Yakima, Washington, the plaintiff bought of the defendant 15 to 20 cars of pears, at $2.35 per box, f.o.b.; that $3,000.00 part payment was to be made upon approval of the order, $500.00 per car to be paid upon receipt of manifest as the pears were put into storage, the balance by sight draft against the bill of lading, pears to be delivered by the defendant to the plaintiff at Chicago, and to be paid for by the plaintiff to the defendant on delivery; that the plaintiff demanded delivery of the pears, and was tendered pears of an inferior grade and quality, which the plaintiff refused, to the damage of the plaintiff

T.E. WELLS & CO., a corp., Appellant,	
v.	APPEAL FROM
THE YAKIMA FRUIT & COLD STORAGE CO., a corp., Defendant,	MUNICIPAL COURT
FIRST NATIONAL BANK OF YAKIMA, a corp., Appellee.	OF CHICAGO.

Opinion filed April 6, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On October 21, 1926, the plaintiff, T. E. Wells & Co., a corporation, began suit in the Municipal Court against The Yakima Fruit & Cold Storage Company, a corporation for $2,000.00, and on the same day filed a statement of claim, containing, in part, the following allegations:-

That on June 26, 1926, at Yakima, Washington, the plaintiff bought of the defendant 18 to 20 cars of pears, at $2.75 per box, f.o.b.; that $2,000.00 part payment was to be made upon approval of the order, $500.00 per car to be paid upon receipt of manifest as the pears were put into storage, the balance by sight draft against the bill of lading, pears to be delivered by the defendant to the plaintiff at Chicago, and to be paid for by the plaintiff to the defendant on delivery; that the plaintiff demanded delivery of the pears, and was tendered pears of an inferior grade and quality, which the plaintiff refused, to the damage of the plaintiff

in the sum of $5,000.00.

On the same day, the plaintiff filed an affidavit for attachment, based on the non-residence of the defendant and an attachment writ in aid was thereupon issued, and at 2:50 p.m., the same day, was served on the First National Bank of Chicago, as garnishee. On the same day, interrogatories to the First National Bank of Chicago, the garnishee, were filed.

On November 10, 1925, the First National Bank of Yakima filed its appearance as an interpleader.

On November 13, 1925, the First National Bank of Chicago, as garnishee, filed its answer to the interrogatories of the plaintiff, F. E. Nellis & Co., The answer set up the following:

> "On or about the 17th day of October, A.D. 1925, it received by mail for collection from the First National Bank of Yakima, Washington, three certain drafts, each in the sum of $684.46, drawn by the Yakima Fruit & Cold Storage Company on F. E. Nellis & Company payable to the order of the First National Bank of Yakima, Washington; that with said drafts it received instructions that upon receipt of the payment of said drafts to credit the amount so received to the account of the First National Bank of Yakima, Washington, kept with this Garnishee, The First National Bank of Chicago, and that thereafter on or about the 21st day of October, A. D. 1925, a representative of F. E. Nellis & Company appeared at the window of its Note Collection Department and paid to this Garnishee the sum of $2,053.38 and took up said drafts; and this Garnishee now holds said sum of $2,053.38 for the account of the said First National Bank of Yakima, Washington."
>
> That on said 21st day of October, A.D.1925, and within a short time after the representative of F. E. Nellis & Company paid and took up said drafts, the attachment writ in the above entitled cause was served upon this Garnishee; that this Garnishee thereupon wrote to the First National Bank of Yakima and informed it of the service of said attachment writ upon it, and in due course received an answer from said First National Bank of Yakima,

in the sum of $2,[illegible].

On the same day, the plaintiff filed an affidavit for attachment, based on the non-residence of the defendant and an attachment writ in aid was thereupon issued, and at 3:30 p.m., the same day, was served on the First National Bank of Chicago, as garnishee. On the same day, interrogatories to the First National Bank of Chicago, the garnishee, were filed.

On November 10, 1922, the First National Bank of Yakima filed its appearance as an interpleader.

On November 13, 1922, the First National Bank of Chicago, as garnishee, filed its answer to the interrogatories of the plaintiff, F. E. Mellis & Co., The answer set up the following:

> "On or about the 17th day of October, A.D. 1922, it received by mail for collection from the First National Bank of Yakima, Washington, three certain drafts, each in the sum of $[illegible], drawn by the Yakima Fruit & Cold Storage Company on F. E. Mellis & Company payable to the order of the First National Bank of Yakima, Washington; that with said drafts it received instructions that upon receipt of the payment of said drafts to credit the amount so received to the account of the First National Bank of Yakima, Washington, kept with this Garnishee. The First National Bank of Chicago, and that thereafter on or about the 21st day of October, A. D. 1922, a representative of F. E. Mellis & Company appeared at the office of its Note Collection Department and paid to this Garnishee the sum of $[illegible] and took up said drafts; and this Garnishee now holds said sum of $[illegible] for the account of the said First National Bank of Yakima, Washington."
>
> That on said 21st day of October, A.D.1922, and within a short time after the representative of F. E. Mellis & Company paid and took up said drafts, the attachment writ in the above entitled cause was served upon this Garnishee; that this Garnishee thereupon wrote to the First National Bank of Yakima and informed it of the service of said attachment writ upon it, and in due course received an answer from said First National Bank of Yakima,

Washington, in which said answer the First National Bank of Yakima informed this Garnishee that it was the owner for value of said drafts and the proceeds thereof; that accompanying said answer this Garnishee received an affidavit of E. J. Lemke, Assistant Cashier of the First National Bank of Yakima, in which said affidavit the said E. J. Lemke stated on oath that the First National Bank of Yakima was the owner of said drafts and the proceeds thereof."

"That at no time has it been subject to the instructions or directions of the Yakima Fruit & Cold Storage Company, and that so far as it is advised, the drafts and proceeds thereof are the property of the First National Bank of Yakima; that at the time of the service of the writ of attachment, it was not indebted to the Yakima Fruit & Cold Storage Company, nor has it become so since, nor did it have at that time, or at any time, any goods, chattels or effects in which the Yakima Fruit & Cold Storage Company had any interest."

Attached to the answer of the Garnishee, the First National Bank of Chicago, is an affidavit of one Lemke, Assistant Cashier of the First National Bank of Yakima, that the moneys sought to be garnisheed by virtue of the writ of attachment were at the time of its service upon the garnishee, the property of the First National Bank of Yakima, and not the property of the principal defendant, the Yakima Fruit & Cold Storage Company.

Also attached to the answer of the garnishee, the First National Bank of Chicago, as an exhibit, was a copy of an assignment from the Yakima Fruit & Cold Storage Company, dated August 6, 1925, to the First National Bank of Yakima, which is as follows:

" WHEREAS, we, the undersigned, are engaged in the business of buying and selling fruit at Yakima, Washington, and the FIRST NATIONAL BANK OF YAKIMA is assisting us in financing our business by loaning us money and advancing money on drafts drawn by us on our customers and on bills of lading issued

Washington, in which said answer the First National Bank of Yakima informed this Garnishee that it was the owner for value of said debts and the proceeds thereof; that accompanying said answer this Garnishee received an affidavit of E. J. Lemke, Assistant Cashier of the First National Bank of Yakima, in which said affidavit the said E. J. Lemke stated on oath that the First National Bank of Yakima was the owner of said debts and the proceeds thereof.

"That at no time has it been subject to the instructions or directions of the Yakima Fruit & Cold Storage Company, and that so far as it is advised, the debts and proceeds thereof are the property of the First National Bank of Yakima; that at the time of the service of the writ of attachment, it was not indebted to the Yakima Fruit & Cold Storage Company, nor has it become so since, nor did it have at that time, or at any time, any goods, effects, or effects in which the Yakima Fruit & Cold Storage Company had any interest."

Attached to the answer of the Garnishee, the First National Bank of Chicago, is an affidavit of one Lemke, Assistant Cashier of the First National Bank of Yakima, that the money sought to be garnished by virtue of the writ of attachment were at the time of its service upon the garnishee, the property of the First National Bank of Yakima, and not the property of the principal defendant, the Yakima Fruit & Cold Storage Company.

Also attached to the answer of the garnishee, the First National Bank of Chicago, as an exhibit, was a copy of an assignment from the Yakima Fruit & Cold Storage Company, dated August 6, 1928, to the First National Bank of Yakima, which is as follows:

I, [illegible], as [illegible], are engaged in the business of buying and selling fruit at Yakima, Washington, and the FIRST NATIONAL BANK OF YAKIMA is assisting us in financing our business by loaning us money and advancing money on debts drawn by us on our customers and in bills of lading issued

by the railroads for shipments of fruit sold; and,

"WHEREAS, in the course of business, we frequently deposit drafts drawn on purchasers of fruit with said bank for collection and we desire to give said drafts and the proceeds thereof as security to said bank for moneys loaned and to be loaned or advanced to us as aforesaid and for future advances;

"NOW, THEREFORE, in consideration of the premises, we hereby assign, transfer and set over unto the FIRST NATIONAL BANK OF YAKIMA, any and all drafts and the proceeds thereof which we may deposit with said bank for collection or otherwise, and any and all bills of lading attached to said drafts, and we do hereby authorize said bank to collect said drafts and apply any moneys so collected to the payment of any indebtedness we may owe said bank, whether due or not, giving said bank full power and authority in the premises to handle said drafts and bills of lading, make said collections and apply the proceeds thereof as it shall seem best, it being expressly understood that said bank does hereby reserve the right, and is hereby authorized to forward items for collection or payment direct to the drawee or payor bank, or through any other bank or agency at its own discretion, and to receive payments in drafts drawn by the drawee or other banks, and except for its own negligence, this bank shall not be liable for dishonor of drafts so received in payment, nor for losses thereon. If said Bank incur any expenses in collecting said drafts or realizing on said bills of lading, we agree to reimburse said expenses to said bank, including any attorneys' fees that it may pay, and said bank is hereby authorized to add the amount of such expenses and attorneys' fees to our indebtedness and retain the same out of the collection made by it."

On December 5, 1925, the First National Bank of Yakima filed an interplea, setting up, among other things, that the money due upon the three certain bills of exchange, each in the sum of $684.46, drawn by the Yakima Fruit & Cold Storage Company upon F. E. Nellis & Co., the plaintiff, and paid by it to the First National Bank of Chicago, was the property of the First

by the railroads for shipments of fruit sold; and,

"WHEREAS, in the course of business, we frequently deposit drafts drawn on purchasers of fruit with said bank for collection and we desire to give authority and the proceeds thereof as security to said bank for moneys loaned and to be loaned or advanced to us as aforesaid and for future advances;

"NOW, THEREFORE, in consideration of the premises, we hereby assign, transfer and set over unto the FIRST NATIONAL BANK OF YAKIMA, any and all drafts and the proceeds thereof which we may deposit with said bank for collection or otherwise, and any and all bills of lading attached to said drafts, and we do hereby authorize said bank to collect said drafts and apply any moneys so collected to the payment of any indebtedness we may owe said bank, whether due or not, giving said bank full power and authority in the premises to handle said drafts and bills of lading, make said collections and apply the proceeds thereof as it shall seem best, it being expressly understood that said bank does hereby reserve the right, and is hereby authorized to forward items for collection or payment direct to the drawee or payee bank, or through any other bank or agency at its own discretion, and to receive payments in drafts drawn by the drawee or other banks, and except for its own negligence, this bank shall not be liable for dishonor of drafts so received in payment, nor for losses thereon. If said Bank incur any expenses in collecting said drafts or realizing on said bills of lading, we agree to reimburse said expenses to said bank, including any attorneys' fees that it may pay, and said bank is hereby authorized to add the amount of such expenses and attorneys' fees to our indebtedness and retain the same out of the collection made by it."

On December 5, 1922, the First National Bank of Yakima filed an interplea, setting up, among other things, that the money due upon the three certain bills of exchange, each in the sum of [illegible], drawn by the Yakima Fruit & Cold Storage Company upon F. E. Mellis & Co., the plaintiff, and paid by it to the First

National Bank of Chicago, was the property of the First National Bank of Yakima; that the bills of exchange were purchased for value in due course before their maturities by the First National Bank of Yakima; that the moneys paid thereon by the said F. E. Nellis & Co., plaintiff, and thereafter sought to be garnisheed by virtue of the writ of attachment issued in this cause, were then and at the time the writ was served upon the garnishee, the First National Bank of Chicago, the property of the First National Bank of Yakima, and not the property of the principal defendant, the Yakima Fruit & Cold Storage Company. The interplea prayed that the court adjudge that the property sought to be attached and garnisheed, ought to be released therefrom.

On January 8, 1926, the plaintiff, F. E. Nellis & Co., filed an answer to the interplea of the First National Bank of Yakima. It denied that the three bills of exchange were the property of the First National Bank of Yakima; denied that they were purchased by it for value, or that at the time of the suing out of the attachment writ, they were the property of the First National Bank of Yakima; that if at any time prior to the attachment they were the property of the First National Bank of Yakima, the assignment to it was without notice to the plaintiff.

It further set up in its answer to the interplea of the First National Bank of Yakima that it, the plaintiff, had demanded delivery of the pears, but that the defendant had refused to make delivery, and in lieu thereof had tendered delivery of pears of an inferior grade and quality, to the

National Bank of Chicago, was the property of the First National Bank of Yakima; that the bills of exchange were purchased for value in due course before their maturities by the First National Bank of Yakima; that the moneys paid thereon by the said R. E. Hallin & Co., plaintiff, and thereafter sought to be garnished by virtue of the writ of attachment issued in this cause, were then and at the time the writ was served upon the garnishee, the First National Bank of Chicago, the property of the First National Bank of Yakima, and not the property of the principal defendant, the Yakima Fruit & Cold Storage Company. The interplea prayed that the court adjudge that the property sought to be attached and garnished, ought to be released therefrom.

On January 8, 1908, the plaintiff, R. E. Hallin & Co., filed an answer to the interplea of the First National Bank of Yakima. It denied that the three bills of exchange were the property of the First National Bank of Yakima; denied that they were purchased by it for value, or that at the time of the suing out of the attachment writ, they were the property of the First National Bank of Yakima; that if at any time prior to the attachment they were the property of the First National Bank of Yakima, the assignment to it was without notice to the plaintiff.

It further set up in its answer to the interplea of the First National Bank of Yakima that it, the plaintiff, had demanded delivery of the peats, but that the defendant had refused to make delivery, and in lieu thereof had tendered delivery of peats of an inferior grade and quality, to the

damage of the plaintiff in the sum of $5,000.00.

On January 29, 1926, the plaintiff filed what is entitled, "A Traverse," in which it admitted that, on October 31, 1925, it F. E. Nellis & Co., paid the First National Bank of Chicago, the Garnishee, $2,053.38, but it denied that the money was held for the account of the First National Bank of Yakima. It admitted that the drafts were attached, but stated that it had no knowledge as to whether or not the First National Bank of Yakima advised the Garnishee that it was the owner for value of the attached drafts; and that it had no knowledge as to whether or not the First National Bank of Chicago, Garnishee, was indebted to the Yakima Fruit & Cold Storage Company at the time of the service of the attachment writ.

With the pleadings in that form, there was a trial before the court, with a jury, and at the close of all the evidence, the court instructed the jury to find the issues as to the claim of the funds in the hands of the garnishee in favor of the intervening claimant, the First National Bank of Yakima, and that the right to that fund was in the intervening claimant. Pursuant to the instruction of the court, the jury brought in a verdict, and judgment was entered in accordance therewith. This appeal is from that judgment.

At the trial there was offered in evidence the deposition of E. J. Lemke, Assistant Cashier of the First National Bank of Yakima, the interpleader; the three drafts, and the assignment of the Yakima Fruit & Cold Storage Company to the First National Bank of Yakima, which was attached to

damage of the plaintiff in the sum of $5,000.00.

On January 26, 1926, the plaintiff filed what is entitled, "A Traverse," in which it admitted that, on October 21, 1925, it F. E. Mellin & Co., paid the First National Bank of Chicago, the Garnishee, $2,055.55, but it denied that the money was held for the account of the First National Bank of Yakima. It admitted that the duties were attached, but stated that it had no knowledge as to whether or not the First National Bank of Yakima advised the Garnishee that it was the owner for value of the attached duties; and that it had no knowledge as to whether or not the First National Bank of Chicago, Garnishee, was indebted to the Yakima Fruit & Cold Storage Company at the time of the service of the attachment writ.

With the pleadings in that form, there was a trial before the court, with a jury, and at the close of all the evidence, the court instructed the jury to find the issues as to the claim of the funds in the hands of the garnishee in favor of the intervening claimant, the First National Bank of Yakima, and that the right to that fund was in the intervening claimant. Pursuant to the instruction of the court, the jury brought in a verdict, and judgment was entered in accordance therewith. This appeal is from that judgment.

At the trial there was offered in evidence the deposition of E. L. Lemke, Assistant Cashier of the First National Bank of Yakima, the interpleader; the three drafts, and the assignment of the Yakima Fruit & Cold Storage Company to the First National Bank of Yakima, which was attached to

the affidavit of Lemke, which affidavit itself is attached to the answer of the First National Bank of Chicago, garnishee, to the interrogatories of the plaintiff.

The evidence of Lemke is substantially as follows: On, or about, August 6, 1925, the First National Bank of Yakima, received the assignment, a copy of which is set forth above, in connection with the answer of the First National Bank of Chicago, garnishee. On October 8, 1925, the First National Bank of Yakima advanced credit to the Yakima Fruit & Cold Storage Company, on a draft with bill of lading attached of F. E. Nellis & Co., of Chicago, the plaintiff, to cover a car of fruit, in the sum of $684.46. On October 10, it advanced a similar credit a second draft for another car in the sum of $684.46, and on October 15, another similar credit on a third draft (for another car) in the sum of $684.46. The drafts were ordinary bank drafts, payable to the First National Bank of Yakima and drawn on F. E. Nellis & Company of Chicago, by the Yakima Fruit & Cold Storage Company. Order bills of lading accompanied the drafts covering each car in question, and also invoices. At the time the drafts were drawn upon F. E. Nellis & Co., the First National Bank of Yakima made payments for the full amount of the drafts by passing the amounts to the credit of the Yakima Fruit & Cold Storage Company, and those credits have since been withdrawn by the Yakima Fruit & Cold Storage Company by check. The First National Bank of Yakima has not received from any one, the proceeds of the drafts since the payment was passed to the credit of the Yakima Fruit & Cold Storage Company. It expects to be repaid by payment of the drafts, which the First National Bank of Yakima has

the affidavit of Lemke, which affidavit itself is attached to the answer of the First National Bank of Chicago, pertinent to the interrogatories of the plaintiff.

The evidence of Lemke is substantially as follows: On, or about, August 6, 1928, the First National Bank of Yakima, received the assignment, a copy of which is set forth above, in connection with the answer of the First National Bank of Chicago, garnishee. On October 8, 1928, the First National Bank of Yakima advanced credit to the Yakima Fruit & Cold Storage Company, on a draft with bill of lading attached of F. E. Mollis & Co., of Chicago, the plaintiff, to cover a car of fruit, in the sum of $824.40. On October 10, it advanced a similar credit a second draft for another car in the sum of $824.40, and on October 12, another similar credit on a third draft (for another car) in the sum of $824.40. The drafts were ordinary bank drafts, payable to the First National Bank of Yakima and drawn on F. E. Mollis & Company of Chicago, by the Yakima Fruit & Cold Storage Company. Order bills of lading accompanied the drafts covering each car in question, and also invoices. At the time the drafts were drawn upon F. E. Mollis & Co., the First National Bank of Yakima made payments for the full amount of the drafts by passing the amounts to the credit of the Yakima Fruit & Cold Storage Company, and those credits have since been withdrawn by the Yakima Fruit & Cold Storage Company by check. The First National Bank of Yakima has not received from any one, the proceeds of the drafts since the payment was passed to the credit of the Yakima Fruit & Cold Storage Company. It expects to be repaid by payment of the drafts, which the First National Bank of Yakima has

been advised by the First National Bank of Chicago has been made.

The Yakima Fruit & Cold Storage Company has a checking account with the First National Bank of Yakima. These particular drafts he, the witness, himself personally received as Assistant Cashier. The Bank was in the habit of receiving similar drafts at the rate of one or more a day. On the day the drafts in question were deposited with the First National Bank of Yakima, the Yakima Fruit & Cold Storage Company was its debtor. Such debts being evidenced by promissory notes. How they were secured, if at all, he did not know. The drafts in question were received by him from the Yakima Fruit & Cold Storage Company, and the amount of the drafts placed to its credit on the books of the bank in the checking account of the Yakima Fruit & Cold Storage Company.

He was unable to state for what purposes the Yakima Fruit & Cold Storage Company drew checks against the account to which the proceeds of the drafts in question were credited. The proceeds of the drafts which were placed to the credit of the Yakima Fruit & Cold Storage Company were available for any purpose it saw fit to use them. The First National Bank of Yakima received notice that the payment of the proceeds of the drafts was being held up on October 21, 1925, by a telegram from the First National Bank of Chicago, and on the same day one of the officers of the First National Bank of Yakima telephoned the Yakima Fruit & Cold Storage Company to the effect that the funds had been garnisheed. The telephone message was sent so as to be able to gain what-

been advised by the First National Bank of Chicago has been made.

The Yakima Fruit & Cold Storage Company has a checking account with the First National Bank of Yakima. These particular drafts he, the witness, himself personally received as Assistant Cashier. The Bank was in the habit of receiving similar drafts at the rate of one or more a day. On the day the drafts in question were deposited with the First National Bank of Yakima, the Yakima Fruit & Cold Storage Company was its debtor. Such debts being evidenced by promissory notes. How they were secured, if at all, he did not know. The drafts in question were received by him from the Yakima Fruit & Cold Storage Company, and the amount of the drafts placed to its credit on the books of the bank in the checking account of the Yakima Fruit & Cold Storage Company.

He was unable to state for what purposes the Yakima Fruit & Cold Storage Company drew checks against the account to which the proceeds of the drafts in question were credited. The proceeds of the drafts which were placed to the credit of the Yakima Fruit & Cold Storage Company were available for any purpose it saw fit to use them. The First National Bank of Yakima received notice that the payment of the proceeds of the drafts was being held up on October 31, 1928, by a telegram from the First National Bank of Chicago, and on the same day one of the officers of the First National Bank of Yakima telephoned the Yakima Fruit & Cold Storage Company to the effect that the funds had been garnisheed. The telephone message was sent so as to be able to gain what-

ever information the bank might get as to what reason there might be for the garnishment of the funds.

The drafts in question have not been charged back, nor taken up by check. The matter was held in abeyance until this cause is terminated, "waiting for the release of the funds for our account." No entries of credit or debit are being made, or will be, "until we secure the release of the funds." The First National Bank of Yakima is relying upon the Yakima Fruit & Cold Storage Company to reimburse it in case there should ultimately be a loss.

The three drafts were, except as to date and amount, substantially as follows:

"Yakima, Washington October 8, 1925.

On Demand Pay to the order of
FIRST NATIONAL BANK OF YAKIMA, WASHINGTON $684.46
SIX HUNDRED EIGHT Y FOUR & 46/100.....Dollars
with exchange
For car No. NP 93248 Bartletts Lot #216
Charge to account of
F. E. Nellis & Company
Chicago, Illinois.
YAKIMA F R UIT & COLD STORAGE COMPANY
By W.A.Berg, Pres.

On the face of this draft appears the following by rubber stamp:

"May hold for arrival of goods"
"Surrender documents attached only on payment of draft"
"First Nat'l Bank Note Teller, Paid Oct.21,1925 Chicago,Ill."
"Coll. Oct. 13, 1925."
"N.P. 3-1."

On the reverse side of the draft appears the following by rubber stamp:

over information the bank might get as to what reason there might be for the withdrawal of the funds.

The drafts in question have not been charged back, nor taken up by check. The matter was held in abeyance until this date is terminated, "waiting for the release of the funds for our account." No entries of credit or debit are being made, or will be, "until we secure the release of the funds." The First National Bank of Yakima is relying upon the Yakima Fruit & Cold Storage Company to reimburse it in case there should ultimately be a loss.

The three drafts were, except as to date and amount, substantially as follows:

"Yakima, Washington October 8, 1928.

On Demand	Pay to the order of
FIRST NATIONAL BANK OF YAKIMA, WASHINGTON	$884.46
SIX HUNDRED EIGHT Y FOUR & 46/100	Dollars
	with exchange
For our No. MP 28242 Certificate Lot #216	
	Charge to account of
	F. E. Mellis & Company
	Chicago Illinois.
	YAKIMA F & CUT & COLD STORAGE COMPANY
	By W.A.Berg,Pres.

On the face of this draft appears the following by rubber stamp:

"May hold for arrival of goods"
"Surrender documents attached only on payment of draft"
"First Nat'l Bank Note Teller, Paid Oct.31,1928 Chicago,Ill."
"Coll. Oct. 12, 1928."
"A.F. C-1."

On the reverse side of the draft appears the following by rubber stamp:

"Pay to the order of any bank, Banker or Trust Co. all prior endorsements guaranteed, Sept. 8, 1925, First National Bank of Yakima 98-33 Yakima, Wash. 98-22."

It is contended for the plaintiff, F. E. Nellis & Co. "that on the broad facts in the case, the money in question does not belong to the forwarding bank." With that we cannot agree. The plaintiff put in no evidence, and as to the material facts in the case, there is no controversy. There is no doubt that when the Yakima Fruit & Cold Storage Company deposited with the First National Bank of Yakima the three drafts, endorsed in blank, they became the property of the bank. Anderson v. Keystone Supply Co., 293 Ill. 468. Doppalt v. National Bank of the Republic, 175 Ill. 432. Further, when the drafts, endorsed in blank, were sent by the First National Bank of Yakima to the First National Bank of Chicago for collection, with instructions that upon receipt of payment of the drafts to credit the amount so received to the account of the First National Bank of Yakima, the title to the proceeds, when the drafts were paid, vested at once in the First National Bank of Chicago, and it then became the debtor of the First National Bank of Yakima in that amount. Anderson v. Keystone Supply Co., (supra). In the latter case, the court said,

> "Furthermore, the decided cases establish the rule that when a negotiable paperis endorsed and transferred before maturity as collateral security for a loan of money then made, the pledgee who takes the paper, without notice of any defense, is a holder for value in the usual course of business."

There is no doubt, under the law, but that when the First National Bank of Yakima accepted the three drafts with bills

"Pay to the order of any bank, banker or trust Co. all prior endorsements guaranteed, Sept. 8, 1922, First National Bank of Yakima 22-32 Yakima, Wash. 22-32."

It is contended for the plaintiff, F. E. Mellis & Co. "that on the proved facts in the case, the money in question does not belong to the forwarding bank." With that we cannot agree. The plaintiff put in no evidence, and as to the material facts in the case, there is no controversy. There is no doubt that when the Yakima Fruit & Cold Storage Company deposited with the First National Bank of Yakima the three drafts, endorsed in blank, they became the property of the bank. Anderson v. Keystone Supply Co., 288 Ill. 466. Donnelly v. National Bank of the Republic, 173 Ill. 474. Further, when the drafts, endorsed in blank, were sent by the First National Bank of Yakima to the First National Bank of Chicago for collection, with instructions that upon receipt of payment of the drafts to credit the amount so received to the account of the First National Bank of Yakima, the title to the proceeds, when the drafts were paid, vested at once in the First National Bank of Chicago, and it then became the debtor of the First National Bank of Yakima in that amount. Anderson v. Keystone Supply Co., (supra). In the latter case, the court said:

> "Furthermore, the decided cases establish the rule that when a negotiable paperis endorsed and transferred before maturity as collateral security for a loan of money then made, the pledgee who takes the paper, without notice of any defense, is a holder for value in the usual course of business."

There is no doubt, under the law, but that when the First National Bank of Yakima accepted the three drafts with bills

of lading attached, it became the holder in due course, and, as the court said in the Anderson case (supra) "It took title to the goods described in the bill of lading attached to the drafts." It follows, here, therefore, that when, on October 31, 1925, the plaintiff attached the proceeds of the three drafts in the hands of the First National Bank of Chicago, the garnishee, the Yakima Fruit & Cold Storage Company, had no interest in them, and neither they nor the proceeds thereof could be held to satisfy its debts. The court in the Anderson case, quotes, with approval, the following:

> " A bank acquiring in due course a draft for the price of goods, with the bill of lading attached, is the owner thereof, and theproceeds in the possession of another bank collecting the draft cannot be attached as the property of the seller." (7 Corpus Juris, 617)

The assignment of August 6, 1925, made by the Yakima Fruit & Cold Storage Company to the First National Bank of Yakima, contains such recitations as definitely show that it was the very purpose of the assignment to give the First National Bank of Yakima full and complete authority and ownership as regards just such drafts as are here in question; that authority being given, as stated in the assignment, in order that the First National Bank of Yakima might assist the plaintiff in financing its business by loaning and advancing money on drafts and bills of lading. The assignment contains these words,

> "We do hereby authorize said bank to collect said drafts and apply any moneys so collected to the payment of any indebtedness we may owe said bank, whether due or not, giving said bank full power and authority in the premises to handle said drafts and bills of lading, making said collections and apply-

of lading attached, it became the holder in due course, and, as the court said in the Anderson case (supra) "it took title to the goods described in the bill of lading attached to the draft." It follows, here, therefore, that when, on October 31, 1922, the plaintiff attached the proceeds of the three drafts in the hands of the First National Bank of Chicago, the garnishee, the Yakima Fruit & Cold Storage Company, had no interest in them, and neither they nor the proceeds thereof could be held to satisfy its debts. The court in the Anderson case, quotes, with approval, the following:

> " A bank acquiring in due course a draft for the price of goods, with the bill of lading attached, is the owner thereof, and thereproceeds in the possession of another bank collecting the draft cannot be attached as the property of the seller." (7 Corpus Juris, 817)

The assignment of August 8, 1922, made by the Yakima Fruit & Cold Storage Company to the First National Bank of Yakima, contains such recitations as definitely show that it was the very purpose of the assignment to give the First National Bank of Yakima full and complete authority and ownership as regards just such drafts as are here in question; the authority being given, as stated in the assignment, in order that the First National Bank of Yakima might assist the plaintiff in financing its business by loaning and advancing money on drafts and bills of lading. The assignment contains these words.

> "We do hereby authorize said bank to collect said drafts and apply any moneys so collected to the payment of any indebtedness we may owe said bank, whether due or not, giving said bank full power and authority in its premises to handle said drafts and bills of lading, making said collections and apply-

ing the proceeds thereof as it shall seem best."

The assignment then further states that the bank is authorized "to forward items for collection or payment direct to the drawee or payor bank, or through any other bank or agency at its own discretion."

Counsel forthe plaintiff urge that the assignment in question was a nugatory instrument. We know of no law which would prevent the plaintiff, the First National Bank of Yakima from making such a contract as is represented by the terms of the assignment.

As to the claim that the First National Bank of Yakima was merely acting as a collector, that is answered by what Mr. Justice Thompson stated in the Anderson case (supra) p. 472, which was to the effect, applying it to the circumstances in this case, that when the Yakima Fruit & Cold Storage Company drafts endorsed in blank, were deposited with the First National Bank of Yakima, they became the property of that bank, and when sent by it to the First National Bank of Chicago for collection, with instructions that upon receipt of the payment ofthe drafts to credit the amount so received to the account of the First National Bank of Yakima, kept with the First National Bank of Chicago, the title to the proceeds when the drafts were paid, vested in the First National Bank of Chicago, and it became the debtor of the First National Bank of Yakima to that extent.

ing the proceeds thereof as it shall seem best."

The assignment then further states that the bank is authorized "to forward items for collection or payment direct to the drawee or payor bank, or through any other bank or agency at its own discretion."

Counsel for the plaintiff urge that the assignment in question was a mortgatory instrument. We know of no law which would prevent the plaintiff, the First National Bank of Yakima from making such a contract as is represented by the terms of the assignment.

As to the claim that the First National Bank of Yakima was merely acting as a collector, that is answered by what Mr. Justice Thompson stated in the Anderson case (supra) p. 472, which was to the effect, applying it to the circumstances in this case, that when the Yakima Fruit & Cold Storage Company drafts endorsed in blank, were deposited with the First National Bank of Yakima, they became the property of that bank, and when sent by it to the First National Bank of Chicago for collection, with instructions that upon receipt of the payment of the drafts to credit the amount so received to the account of the First National Bank of Yakima, kept with the First National Bank of Chicago, the title to the proceeds when the drafts were paid, vested in the First National Bank of Chicago, and it became the debtor of the First National Bank of Yakima to that extent.

To hold that the buyer, after paying for the merchandise, and finding it bad, is not entitled to go at once to the bank to whom he has made his payment and get back his money, may seem at first blush a hardship and injustice; but it must be borne in mind that just as soon as the bank here received the money it became, eo instanti, the debtor of the sender of the drafts, and so could not return the money to the buyer of the goods, and, further, that the sender of the draft, by reason of its contract of assignment with the seller, was entitled to use, at once, the credit it had with the bank here; thus relegating the buyer to his rights for breach of contract or otherwise, against the seller.

It is urged further for the plaintiff that the trial judge erred in instructing the jury at the close of all the evidence to find for the First National Bank of Yakima, the interpleader; and it is claimed that the matters involved should have been left for the sole determination of the jury itself. The record shows that no material fact in the case was in dispute, and that being the situation, we are of the opinion that it was entirely proper for the trial judge to instruct the jury as he did.

Finding no error in the record, the judgment will be affirmed.

AFFIRMED.

O'CONNOR AND THOMSON, JJ. CONCUR.

To hold that the buyer, after paying for the merchandise, and finding it bad, is not entitled to go at once to the bank to whom he has made his payment and get back his money, may seem at first blush a hardship and injustice; but it must be borne in mind that just as soon as the bank here received the money it became, <u>ipso facto</u>, the debtor of the sender of the draft, and so could not return the money to the buyer of the goods, and, further, that the sender of the draft, by reason of its contract of assignment with the seller, was entitled to use, at once, the credit it had with the bank here; thus relegating the buyer to his rights for breach of contract or otherwise, against the seller.

It is urged further for the plaintiff that the trial judge erred in instructing the jury at the close of all the evidence to find for the First National Bank of Tulsa, the interpleader; and it is claimed that the matters involved should have been left for the sole determination of the jury itself. The record shows that no material fact in the case was in dispute, and that being the situation, we are of the opinion that it was entirely proper for the trial judge to instruct the jury as he did.

Finding no error in the record, the judgment will be affirmed.

O'CONNOR AND THOMSON, JJ. CONCUR.

ALLEN, J.

130 - 31260

MARY SANFORD, Defendant in Error, v. A. L. WILLIAMS, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

Opinion filed April 6, 1927.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Mary Sanford, claiming that, upon a suit for damages being brought in her name against the City of Chicago, by the defendant, A. L. Williams, as her attorney, and a judgment for $4500.00 being recovered and that amount paid to him, of which he paid her only $2300.00, when they had agreed that he should get for his services only one-third of what might be recovered, brought suit against him, the defendant, for the difference between one-third and one-half of $4500.00. There was a trial before the court, with a jury, and a verdict and judgment for the plaintiff in the sum of $741.92. The defendant prosecutes this writ of error to reverse that judgment.

The plaintiff's husband died on July 29, 1919, as the result of injuries received in certain race riots in Chicago, in 1919.

In July or August, 1919, the defendant talked with the plaintiff about a claim which she might have

Opinion filed April 6, 1927.

MR. PRESIDING JUSTICE YARDIN delivered the opinion of the court.

The plaintiff, Mary Mudrak, obtained judgment against the City of Chicago, by the defendant, A. L. Williams, as her attorney, and a judgment for $4500.00 being recovered and that amount paid to him, of which he paid her only $1500.00, then they had agreed that he should get for his services only one-third of that sum if he recovered, thereby suit against him, the defendant, for the difference between one-third and one-half of $4500.00. There was a trial before the court, with a jury, and a verdict and judgment for the plaintiff in the sum of $741.00. The defendant prosecutes this writ of error to review that judgment.

The plaintiff's husband died on July 20, 1918, as the result of injuries received in service from which in Chicago, in 1918.

In July or August, 1919, the defendant talked with the plaintiff about a claim which she might have

against the City as the result of her husband's death. It is his evidence that he told her that, as she said she had no money, he would take her case for 50 per cent of what might be recovered, and that she agreed; that he investigated the case and, after further talks with her, especially as to filing the suit as a poor person, he brought suit in the Superior Court in the name of the Public Administrator; that another lawyer, one De Armant, also, brought suit for her; that when he found that out, he talked with her and she said for both of them to go on and not have any fight, that each of the lawyers and herself could have one-third of what might be recovered; that he told her that if he did not succeed in getting De Armant out of the case that would be all right; that he then went before Judge Hopkins and had De Armant removed; that some time before De Armant was removed he had an agreement that he should get half of what might be recovered; that the first suit he, the defendant, began, he caused to be non-suited; that before beginning another suit for her he talked with her and told her that as they had no writing as to fees, the matter ought to be put in the form of a contract; that, accordingly, in his office she signed a contract providing that what might be recovered should be divided equally between them.

A regular form of Contract and Power of Attorney, purporting to be signed by the plaintiff, and providing for the retainer of the defendant, and that he should receive as compensation for his services a sum equal to

against the City as the result of her husband's death. It is his evidence that he told her that, as she said she had no money, he would take her case for 50 per cent of what might be recovered, and that she agreed; that he investigated the case and, after further talks with her, ostensibly on to filing the suit as a poor person, he brought suit in the Superior Court in the name of the Public Administrator; that another lawyer, one Dr Armant, also, brought suit for her; that some he found that out, he talked with her and she said for such of them to go on and not have any fight, that such of the lawyers and herself would have one-third of what might be recovered; that he told her that if he did not succeed in getting Dr Armant out of the case that would be all right; that he then went before Judge Hopkins and had Dr Armant recovered; that some time before Dr Armant was removed he had an agreement that he should get half of what might be recovered; that the first suit he, the defendant, began, he caused to be non-suited; that before beginning another suit for her he talked with her and told her that as they had no writing as to fees, the matter ought to be put in the form of a contract; that, accordingly, in his office she signed a contract providing that what might be recovered should be divided equally between them.

A regular form of Contract and Power of Attorney, purporting to be signed by the plaintiff, and providing for the retainer of the defendant, and that he should receive as compensation for services a sum equal to

one-half of any settlement, was introduced in evidence.

The plaintiff denied that she had ever retained De Armant, or that she ever had any conversation with the defendant as to each of the three getting one-third. It is her evidence that she never agreed to give the defendant one-half; that the defendant said he would take one-third, and that such an agreement was made just before the money was paid. As to her signature to the alleged Contract and Power of Attorney, her evidence is somewhat confusing, but, neverthe less, we think demonstrates that it was her signature. At first, on cross-examination, she said she did not think it was her handwriting; on rebuttal she said it was not her handwriting, and then on cross-examination said if she did sign it (referring to it and three other writings) she signed blank pieces of paper. The other papers referred to consisted of (1) a Power of Attorney, dated March 26, 1923, to the defendant to collect the judgment; (2) an assignment of the judgment, dated February 16, 1923, to the State Bank, which was made in order to turn the judgment into cash, and (3) a receipt dated May 8, 1926, for $2300.00, "In full payment of moneys due me from suit against the City of Chicago, being my portion of $4500.00 judgment as per former agreement with said A. L. Williams." One Stollers, a handwriting expert, testified that the writing of the name, "Mary Sanford," on each of the four documents is in the same handwriting.

On her cross-examination when originally called and testifying for herself, she stated that the signature to the

one-half of any settlement, was introduced in evidence.

The plaintiff denied that she had ever noticed the drunk, or that she ever had any conversation with the defendant as to each of the three letters concerned. If in her evidence that she never agreed to give the defendant one-half; that the defendant said he would take one-third, and that such an agreement was made just before the money was paid. As to her signature to the alleged contract and power of attorney, her evidence is somewhat confusing, but, nevertheless, she strongly denounces that it was her signature. At first, on cross-examination, she stated she did not think it was her handwriting; on redirect she said it was not her handwriting, and then on cross-examination said if she did sign it (referring to it and other other writings) she signed about pieces of paper. The other papers referred to consisted of (1) a power of attorney, dated March 22, 1922, to the defendant to collect the judgment; (2) an assignment of the judgment, dated February 12, 1923, to the State Bank, which was made in order to turn the judgment into cash, and (3) a receipt dated May 2, 1922, for $2000.00, "in full payment of claims due me from suit against the Ditmont Chicago, being my portion of $4000.00 judgment as per former agreement with Mack A. L. Williams." One Collins, a handwriting expert, testified that the writing of the name, "Mary Sanford," on each of the four documents is in the same handwriting.

The defendant, when cross-examined, stated that the signature to the alleged contract, and the signature to the

assignment of judgment of February 16, 1923, was in her handwriting; as to her signature to the Contract and Power of Attorney of March 26. 1923, she said, "Yes, - that does not look like my handwriting. No. I am not sure;" that she did not think that the signature to the Contract and Power of Attorney which was undated, and which purported to retain the defendant and to promise him one-half in case of settlement, was in her handwriting; and that the signature to the receipt of May 8, 1926, for $2300.00, to the defendant, which states that it was in full payment of what was due her from the City upon her judgment, according to her former agreement with the defendant, was in her handwriting.

Considering the issue that was made, and the way in which the case was tried, the chief question that arises here, is whether the evidence proved that there was a contract between the plaintiff and the defendant that he should be paid, as compensation for his services, an amount equal to one -third of the amount of the judgment, less the discount. In our judgment, the verdict of the jury was manifestly against the weight of the evidence.

Analyzing the evidence, the conclusion seems irresistible that the contract and power of attorney, by which she agreed to pay him as compensation for his services, a sum equal to one-half, was signed by the plaintiff.

The expert who examined the four documents presented to him, the signatures to two of which the plaintiff testified were authentic, stated that all four signatures were in the same handwriting. The defendant testified that the signature

endorsement of judgment of February 16, 1955, was in her handwriting as to her signature to the document and power of Attorney of March 26, 1955, she said, "Yes, - that does not look like my handwriting. No. I am not sure" that she did not think that the signature to the document and power of Attorney which was matched, and which purported to contain the defendant and to promise him one-half in case of settlement, was in her handwriting and that the signature to the receipt of May 6, 1955, for $2,000.00, to the defendant, which receipt she at one in full payment of what was due her from the City upon her judgment, according to her former agreement with the defendant, was in her handwriting.

Considering the issue that was made, and the way in which the case was tried, the chief question that arises here, is whether the evidence proved that there was a contract between the plaintiff and the defendant that he should be paid, as compensation for his services, an amount equal to the value of the assets of the judgment. Does the Statute, in her judgment, the weight of the jury was sufficiently against the weight of the evidence.

Analyzing the evidence, the remaining means irrefutable that the contract had power of attorney, in which she agreed to pay him as compensation for his services, a sum equal to one-half, was signed by the plaintiff.

The expert who examined the two handwriting presented to him, the signature to the of with the plaintiff testified were authentic, stated that all four signatures were in the same handwriting. The defendant testified that the signature

to the contract and power of attorney was signed in his office by the plaintiff, and all that can be made from the testimony of the plaintiff in regard to her signature to the contract and power of attorney is that at one time she did not think it was in her handwriting, and when called again, in rebuttal, that it was not in her handwriting. Further, although she testified that the agreement throughout all her relations with the defendant was that he should get one-third, the original statement of claim she filed, made no reference to any such arrangement, and the amended statement of claim, which was subsequently filed, was based on an alleged ordinance of the City Council providing that as to judgments to be entered against the City for the sum of $4500.00 in each of the race riot cases, the amount of the attorney's fees should not exceed 35%.

On the ground that the verdict was against the manifest weight of the evidence, it becomes necessary to reverse the judgment.

Some matters are referred to in the brief of counsel for the plaintiff, which pertain to the condition of the record, and to certain exhibits, but in the view we take of the case, they are unimportant, and not only unimportant, but immaterial.

The judgment, therefore, will be reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

to the contract and power of attorney was signed in his office by the plaintiff, and all that can be made from the testimony of the plaintiff in regard to her signature to the contract and power of attorney is that at one time she did not think it was her handwriting, and when called again, in rebuttal, that it was not in her handwriting. Further, although she testified that the agreement throughout all her relations with the defendant was that he should get one-third, the original evidence of claim she filed, made no reference to any such arrangement, and the amended statement of claim, which was subsequently filed, was based on an alleged oral agreement of the City Council providing that as to judgments to be entered against the City for the sum of $8000.00 in each of the same tort cases, the amount of the attorney's fees should not exceed $20.

On the ground that the verdict was against the manifest weight of the evidence, it becomes necessary to review the judgment.

Good motives are referred to in the brief of counsel for the plaintiff, which pertain to the conditions of the record, and it appears sufficient, but in the view we take of the case, they are unimportant, and not only unsupported, but immaterial.

The judgment, therefore, will be reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

O'CONNOR, J., AND THE CH. J., C. J. DISS.

136 - 31368

PHILIP A. KAMESCH, Appellee, v. MAX AARON AND JOHN VITALORA, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

Opinion filed April 6, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff obtained a verdict and judgment against the defendants jointly for $200.00 in an action of trespass for an assault and battery, and the defendants appeal.

The record discloses that on November 1, 1924, plaintiff, who was in the grocery business, drove in his automobile to south Water street, where he desired to make some purchases and backed it up to the sidewalk so that part of the truck was in front of the commission house of B.Aaron & Sons of which corporation the defendant Max Aaron was president and the defendant John Vitalora was a salesman employed by the corporation. The evidence further shows that the defendant Vitalora and some other employes of B. Aaron & Sons were handling lettuce on the sidewalk in front of their employer's place of business and that plaintiff's truck, backed up as it was to the sidewalk, interfered with them in their work, and plaintiff was requested to move his truck so as not to interfere with the handling of the lettuce. This he refused to do. An alter-

No. 1320 - 21800

PHILIP A. HANSON,

Appellee,

v.

RAY LARSEN AND JOHN VIRGINS,

Appellant.

Opinion filed April 6, 1937.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff obtained a verdict and judgment against the defendants jointly for $800.00 in an action of trespass for an assault and battery, and the defendants appeal.

The record discloses that on November 1, 1934, plaintiff, who was in the grocery business, drove his automobile to south Water street, where he desired to make some purchases and hooked it up to the sidewalk so that part of the wheel was in front of the automobile beyond of a.Larson & Sons of which corporation the defendant Ray Larson was president and the defendant John Virgins was a salesman employed by the corporation. The evidence further shows that the defendant Virgins and some other employes of R. Larson & Sons were handling lettuce on the sidewalk in front of their employer's place of business and that plaintiff's truck, hooked up as it was to the sidewalk, interfered with them in their work, and plaintiff was requested to move his truck so as not to interfere with the handling of the lettuce. This he refused to do. In alter-

cation occurred between him and the defendant Vitalora. Vitalora struck plaintiff in the mouth and severely injured him. There is evidence to the effect that plaintiff called Vitalora a vile name just before the altercation. There is further evidence to the effect that the defendant, Aaron, prior to the time of the altercation said to the defendant, Vitalora, and another employee of B. Aaron & Sons "get him out of there" referring to plaintiff. A number of witnesses, including the defendants, testified that Aaron made no such statement and that he took no part in the controversy and had nothing to do with it other than he was near the door of the store of B. Aaron & Sons at and before the time of the altercation.

The jury were instructed that if they believed from the evidence that Vitalora assaulted the plaintiff and that the defendant, Aaron, "stood by and aided, abetted, assisted or encouraged Vitalora in making said assault, then Aaron was equally liable with Vitalora," and since the jury found in plaintiff's favor and against both defendants, it must be presumed that they found that Aaron abetted or encouraged Vitalora in making the assault.

The only argument in this court is made on behalf of Aaron and it is contended that the court should have directed a verdict in his favor as requested by him. With this contention we cannot agree. We think the question of Aaron's liability was for the jury. The law is well settled to the effect that if one defendant commits an assault upon the plaintiff and another defendant aids, advises, abets or encourages such assault, both are liable. Hildreth v. Hancock, 156 Ill. 618; 5 C.J. 626; 2 R.C.L. 573. It is

action occurred between him and the defendant Vitalaire. Vitalaire struck plaintiff in the mouth and severely injured him. There is evidence to the effect that plaintiff called Vitalaire a vile name just before the altercation. There is further evidence to the effect that the defendant, Aaron, prior to the time of the altercation said to the defendant, Vitalaire, and another employee of R. Aaron & Sons "get him out of there" referring to plaintiff. A number of witnesses, including the defendants, testified that Aaron made no such statement and that he took no part in the controversy and had nothing to do with it other than he was near the door of the premises of R. Aaron & Sons at and before the time of the altercation.

The jury were instructed that if they believed from the evidence that Vitalaire assaulted the plaintiff and that the defendant, Aaron, "stood by and aided, abetted, assisted or encouraged Vitalaire in making said assault, then Aaron was equally liable with Vitalaire," and since they found in plaintiff's favor and against both defendants, it must be presumed that they found that Aaron abetted or encouraged Vitalaire in making the assault.

The only argument in this court is made on behalf of Aaron and it is contended that the court should have directed a verdict in his favor as requested by him. With this contention we cannot agree. We think the question of Aaron's liability was for the jury. The law is well settled to the effect that if one defendant commits an assault upon the plaintiff and another defendant aids, abetts or encourages such assault, both are liable. Highsmith v. Lancaster, 116 Ill. App. 2d 2, 252 N.E.2d 575. It is

also the law that if one is merely present at the time an assault is committed, he is not liable even though he mentally approves of the assault. 2 R.C.L. 527; Brink v. Purnell, 162 Mich. 147; Blue v. Christ, 4 Ill. 351. So in the instant case if the jury believed that the defendant Aaron told the defendant Vitalora "to get him out of there referring to plaintiff, and that shortly thereafter Vitalora assaulted plaintiff, as disclosed by the evidence, they might draw the inference that Aaron abetted or encouraged the assault, in which case he would be equally liable with Vitalora. The inference, however, was for the jury and not for the court. Kavale v. Morton Salt Co., 242 Ill. App. 305; Moore v. Rosemond, 238 N.Y. 358.

Counsel for the defendants cite a number of cases, most of which, however, are master and servant cases, where the liability of the master is predicated on the doctrine of respondeat superior and therefore, inapt because in the instant case both defendants are charged in the declaration as joint tort feasors.

A further complaint is made that the court erred in refusing to instruct the jury as requested by the defendants that even if they found the defendant Aaron had used the words "get him out of there" as above stated, it did not authorize an assault or make the defendant Aaron, liable for one if committed by Vitalora. We think the instruction was properly refused. As above stated the jury might draw the inference that if Aaron used the words "get him out of there," he thereby abetted or encouraged the assault.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

also the law that if one is merely present at the time an assault is committed, he is not liable even though he manifestly approves of the assault. 2 R.C.L. 187; Brink v. Tufford, 187 App. 147; Rex v. Dunlop, 4 Ill. 288. So in the instant case if the jury believed that the defendant Aaron told the defendant Vitiano "to get him out of there referring to plaintiff, and that shortly thereafter Vitiano assaulted plaintiff, as disclosed by the evidence, they might draw the inference that Aaron abetted or encouraged the assault, in which case he would be equally liable with Vitiano. The instruction, however, was for the jury and not for the court. Lewis v. Dayton Bell Co., 348 Ill. App. 288; Moore v. Thompson, 288 N.Y. 328.

Counsel for the defendants cite a number of cases, most of which, however, are earlier and reversal cases, where the liability of the master is predicated on the doctrine of respondeat superior and therefore, input because in the instant case both defendants are charged in the indictment as joint tort feasors.

A further complaint is made that the court erred in refusing to instruct the jury as requested by the defendants that even if they found the defendant Aaron had used the words "get him out of there" as above stated, it did not authorize or assault or make the defendant Aaron, liable for one if committed by Vitiano. We think the instruction was properly refused. It alone invited the jury might draw the inference that if Aaron used the words "get him out of there," he thereby abetted or encouraged the assault.

The judgment of the Superior Court of Cook County is affirmed.

VITUM, P.J. and SCHNEIDER, J., concur.

AFFIRMED.

145 - 31375

W. T. COOK, Appellee,	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
v.	
F. W. AEVERMANN, Appellant.	

Opinion filed April 6, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action against the defendant and the Chicago Railways Company and the Chicago City Railway Company to recover damages claimed to have been sustained by him for personal injuries. The case was tried before a jury and at the close of plaintiff's case the defendants moved for a directed verdict in their favor. The motions were overruled and the defendant, Aeverman, proceeded to introduce evidence and after two occurrence witnesses had testified and after they were cross-examined by counsel for the street car companies, at considerable length, the court on motion of counsel for the street car companies directed a verdict in favor of the street car companies. The trial then proceeded and there was a verdict and judgment against Aevermann for $2,000.00.

The record discloses that about four o'clock on the afternoon of September 27, 1923, as plaintiff was in the act of cranking his truck, which stood near the north curb of West Division Street, from fifty to one hundred feet east of Crawford avenue, and facing west a street car was

Opinion filed April 6, 1927.

approaching from the east in Division street and the defendant, Aevermann, was driving his truck in Division street in the same direction and when the street car and Aevermann's truck had reached the point opposite where plaintiff's truck was standing there was a collision between the street car and Aevermann's truck, as a result of which Aevermann's truck collided with plaintiff's truck, pushing it forward and injuring plaintiff.

A police officer was called on behalf of plaintiff and testified that he was at the northeast corner of Crawford avenue and Division street and saw plaintiff's truck standing near the north curb of Division street, about fifty feet east of him; that at about that time he saw the street car and Aevermann's truck about 150 feet farther east crossing Harding avenue; that the street car, and Aevermann's truck which was traveling immediately north of the street car, seemed to be racing; that the street car and the truck were about even; that he then momentarily looked toward the north and then heard a crash and on turning around he saw that a collision had occurred between the street car and the two trucks. This was all the evidence offered on behalf of plaintiff as to how the accident occurred and at the close of plaintiff's case counsel for the street car companies and counsel for Aevermann made separate motions for a directed verdict. Both motions were denied, and then two witnesses were called on behalf of the defendant, Aevermann. They gave testimony to the effect that for about two blocks east of Crawford avenue the street car was traveling west behind Aevermann's truck, which was straddling the north rail of the west bound street car track; that the street

approaching from the east in Division street had the defendant, Averesman, was driving his truck in Division street in the same direction and when the street car and Averesman's truck had reached the point opposite where plaintiff's truck was standing there was a collision between the street car and Averesman's truck, as a result of which Averesman's truck collided with plaintiff's truck, pushing it forward and injuring plaintiff.

A police officer was called on behalf of plaintiff and testified that he was at the northeast corner of Crawford avenue and Division street and saw plaintiff's truck standing near the north curb of Division street, about fifty feet east of him; that at about that time he saw the street car and Averesman's truck about 150 feet farther east coming darting avenue; that the street car, and Averesman's truck with him travelling immediately north of the street car, seemed to be racing; that the street car and the truck were about even; that he then momentarily looked toward the north and then heard a crash and on turning around he saw that a collision had occurred between the street car and the two trucks. This was all the evidence offered on behalf of plaintiff as to how the accident occurred and at the close of plaintiff's case counsel for the street car company and counsel for Averesman made separate motions for a directed verdict. Both motions were denied, and then two witnesses were called on behalf of the defendant, Averesman. They gave testimony to the effect that for about two block east of Crawford avenue the street car was travelling east behind Averesman's truck, which was straddling the north rail of the west bound street car track; that the street

car was traveling about thirty miles per hour and at about the time Aevermann's truck had reached a point nearly opposite plaintiff's standing truck, the street car ran into the rear end of Avermann's truck and threw it against plaintiff's truck causing it to injure the plaintiff who was in the act of cranking his truck. These two witnesses were cross-examined by counsel for the street car companies and one of them was cross-examined by counsel for plaintiff. The testimony of one of these witnesses was also to the effect that there were a number of broken windows on the north side of the street car which resulted from the collision. At the close of the cross-examination of these two witnesses, the court adjourned for lunch and upon the convening of court in the afternoon, at the request of counsel for the street car companies, the parties went into the chambers and counsel for the street car companies then again asked that his motion for a directed verdict be allowed as of the time plaintiff closed his case. This motion was allowed and the jury were instructed accordingly. The suit was dismissed as to the street car companies and counsel for the street car companies then left the court room. The case then proceeded with the result as above stated and the defendant, Aevermann, appeals.

Although no point is made that the court erred in sustaining the motion made on behalf of the street car companies, we think we ought to say that it was clearly erroneous and prejudicial to the defendant Aevermann, and in view of the fact that the court told the jury that in dismissing the suit as against the street car companies, on account of there being insufficient evidence offered on behalf of the plaintiff, as against them, it is obvious that

car was travelling about thirty miles per hour and at about the time Lawrence's truck had reached a point nearly opposite plaintiff's standing truck, the driver car ran into the rear end of Lawrence's truck and thrown it against plaintiff's truck causing it to injure the plaintiff who was in the act of examining his truck. Three eye witnesses were cross-examined by counsel for the street car company and one of them was cross-examined by counsel for plaintiff. The testimony of one of these witnesses was also to the effect that there were a number of broken windows on the north side of the street car which resulted from the collision. At the close of the cross-examination of these two witnesses, the court adjourned for lunch and upon the convening of court in the afternoon, at the request of counsel for the street car company, the parties went into the chambers and counsel for the street car companies then again asked that his motion for a directed verdict be allowed as of the time plaintiff closed his case. This motion was allowed and the jury were instructed accordingly. The suit was dismissed as to the street car companies and counsel for the street car companies then left the court room. The case then proceeded with the result as above stated and the defendant, Lawrence, appeals.

Although to point is made that the court erred in sustaining the motion made on behalf of the street car companies, we think we ought to say that it was clearly erroneous and prejudicial to the defendant Lawrence, and in view of the fact that the court told the jury that in directing the suit as against the street car companies, on account of their being liable, evidence offered on behalf of the plaintiff, as against them, is to be taken as

the jury would return a verdict finding Aevermann guilty, because it is admitted that plaintiff was guilty of no negligence and that he was injured through the fault of Aevermann or the street car companies or both. And when the street car companies were dismissed from the case, obviously Aevermann could not have been found not guilty, although the evidence, had the case gone to the jury as against all of the defendants, might have warranted the jury in finding the street car companies alone guilty.

The testimony of the police officer called on behalf of the plaintiff was sufficient to make out a case against the street car companies as well as against Aevermann. Whether the defendants or either of them were guilty of negligence, was a question for the jury to determine, even if there was no evidence except that of the police officer. Nor was there any warrant in the law in permitting the street car companies, after its counsel had cross-examined the two witnesses, called on behalf of thedefendant, Aevermann, to renew its motion for a directed verdict as of the time when plaintiff closed its case. Where a defendant makes a motion at the close of plaintiff's case for a directed verdict, if he desires to save his point, he must take no further part in the trial. If he does take such part and desires a directed verdict, the court in passing on such motion must do so as of the time he makes such second motion and consider all of the evidence then introduced. J.,A.&N.Ry. Co. v. Velie, 140 Ill. 59; Fowler v. C. & N. I. R. Co., 182 Ill. App. 123. Of course, if there is more than one defendant and motions are made on behalf of all of the defendants at the close of the plaintiff's case and they are overruled

the jury would return a verdict finding defendants guilty, because it is admitted that plaintiff was guilty of no negligence and that he was injured through the fault of defendants or the agent or employee or both. And when the agent or employee were dismissed from the case, obviously defendants could not have been found not guilty, although the evidence, had the case gone to the jury as against all of the defendants, might have warranted the jury in finding the agent or employee alone guilty.

The testimony of the police officer called on behalf of the plaintiff was sufficient to make out a case against the agent or employee as well as against defendants. Whether the defendants or either of them were guilty of negligence, was a question for the jury to determine, even if there was no evidence except that of the police officer. Nor was there any warrant in the law in permitting the agent or employee, after its counsel had cross-examined the two witnesses, called on behalf of defendants, defendants, to have his motion for a directed verdict as of the time when plaintiff closed his case. There a defendant makes a motion at the close of plaintiff's case for a directed verdict, if he desires to move his point, he must take no further part in the trial. If he does take such part and decline a directed verdict, the court in passing on such motion must do so as of the time he makes such second motion and consider all of the evidence then introduced. L.R.A.1917A, 78. c. Pelis, 124 III. 89; Kimler v. C. & W. I. R. Co., 180 Ill. App. 123. Of course, if there is more than one defendant and such as are made on behalf of all of the defendants at the close of the plaintiff's case and they are overruled

and one of the defendants stands by his motion, the other defendant by putting in evidence cannot effect the defendant who stands by his motion as that defendant's case must be determined as it existed when his motion for a directed verdict was made, notwithstanding the fact that the other defendant subsequently introduced evidence in his own behalf. Condon v. Schoenfeld, 214 Ill. 226; Postal Telegraph-Cable Co. v. Likes, 225 Ill. 249.

Defendant, Aevermann, contends that the court erred in giving instructions Nos. 1, 2, 6, and 9 on behalf of the plaintiff. While we might not reverse the judgment on account of these instructions were it otherwise correct, we think we ought to say that none of them should have been given. Instruction No. 1 sought to set out the facts in some detail and told the jury that if they believed those facts to have been shown by the evidence they should find Aevermann guilty. The court ought not, except in rare cases, tell the jury what facts constitute negligence, that is a question for them to decide from all the evidence. Pennsylvania Co. v. Reidy, 75 Ill. App. 343; Tracy v. Chicago Ry. Co., 185 Ill. App. 135; Chicago City Ry. Co. v. Dinsmore, 162 Ill. 658; I.C. R.R. Co. v. Johnson, 221 Ill. 42. Instruction No. 2 told the jury that in estimating the plaintiff's damages, they should take into consideration expenses incurred by plaintiff's for medicine, medicinal and surgical attention, although there was no evidence offered that plaintiff had incurred any expense, at least no evidence of the amount of such expense. By instruction 6, the jury were told, among other things, that if "Aevermann failed to have his automobile under

and one of the defendants attacks by his motion, the other defendant by putting in evidence cannot affect the defendant who attacks by his motion so that defendant's case must be determined as it existed when his motion for a directed verdict was made, notwithstanding the fact that the other defendant subsequently introduced evidence in his own behalf. Dunham v. Schoenfeld, 214 Ill. 388; Jerry Vincent-Little Co. v. Kline, 205 Ill. App.

Defendant's argument, contends that the court erred in giving instructions Nos. 1, 2, 6, and 9 on behalf of the plaintiff. While we might not approve the judgment on account of these instructions were it otherwise convinced, we think we ought to say that some of them should have been given.

Instruction No. 1 sought to set out the facts in some detail and told the jury that if they believed these facts to have been shown by the evidence they should find defendants guilty. The court ought not, except in rare cases, tell the jury what facts constitute negligence, that is a question for them to decide from all the evidence. Pennsylvania Co. v. Lilly, 78 Ill. App. 2nd; Court v. Chicago Ry. Co., 208 Ill. App. 478; Chicago City Ry. Co. v. Jimmerson, 208 Ill. 488; I.C. R.R. Co. v. Jones, 203 Ill. 68. Instruction No. 2 told the jury that in estimating the plaintiff's damages, they should take into consideration expenses incurred by plaintiff's for medical, medical and surgical attention, although there was no evidence offered that plaintiff had incurred any expense, it been in evidence of the court at, and argument, by instruction 6, the jury are told, among other things, that if "defendants failed to have his automobile under

reasonable control by not using his steering lever, brakes and current controller," or if they believed that Aevermann was driving his truck at a rate of speed exceeding fifteen miles per hour, or if he was driving at such speed that his automobile could not be promptly and quickly stopped, etc. they should find him guilty. This instruction was clearly erroneous. There was no evidence tending to show that Aevermann could not use his steering lever or that there was such a lever on the car. As stated, the jury ought to be told the law without attempting to go into the details of the evidence.

Instruction 9 was in the language of Sec. 22 of the Motor Vehicle Act and ought not to have been given for a number of reasons. It told the jury that the statute provided that no person should drive a vehicle of the First Divisions as described in Section II of this Act, etc. They were no where told what section 2 of the act provided. Moreover, the First Division of Sec. 2 of the act refers to vehicles "designed and used for the carrying of not more than seven persons," while the second division of that section refers to motor cars designed for carrying freight, and the evidence indicates that Aevermann's vehicle belonged to the second division. It is referred to in the evidence as being a truck and, therefore, was not used for carrying passengers. Moreover, this instruction quoted the statute further with reference to what would be prima facie evidence, that the motor vehicle was running at a rate of speed greater than was reasonable and proper, having regard to the traffic. It is very doubtful whether the jury would understand "what prima facie evidence is." Stansfield v.

reasonable control by not using his steering lever, unless and current continued," or if they believed that defendant was driving his truck at a rate of speed exceeding fifteen miles per hour, or if he was driving at such speed that his automobile could not be promptly and quickly stopped, etc. they should find him guilty. This instruction was clearly erroneous. There was no evidence tending to show that defendant could not use his steering lever or that there was such a lever on the car. As stated, the jury ought to be left the law without attempting to go into the details of the evidence.

Instruction 9 was in the language of Sec. 22 of the Motor Vehicle Act and ought not to have been given for a number of reasons. It told the jury that the statute provided that no person should drive a vehicle of the first division as described in Section 11 of this Act, etc. There no where said that section 8 of the act provided. Moreover the first division of Sec. 8 of the act refers to vehicles "designed and used for the carrying of not more than seven persons," while the second division of that section refers to motor cars designed for carrying freight, and the evidence indicates that defendant's vehicle belonged to the second division. It is referred to in the evidence as being a truck and, therefore, was not used for carrying passengers. Moreover, this instruction gveted the statute further with reference to what would be prima facie evidence, that the motor vehicle was running at a rate of speed greater than was reasonable and proper, having regard to the traffic. It is very doubtful whether the jury could understand "what prima facie evidence is." Stanczykiewicz v.

Wood, 231 Ill. App. 586; Johnson v. Pendergast, 308 Ill. 255; Harris v. Piggly Wiggly Stores, Inc., 236 Ill. App. 392. We think the court ought notto have given instruction 8, for the reason that it attempted to enumerate the various facts as disclosed by the evidence. The jury ought to be told what the law is without attempting to enumerate the various facts which plaintiff claimed the evidence tended to prove.

Complaint is also made that the court erred in refusing to give instructions Nos. 9, 10 and 11 offered by Aevermann. Instructions Nos. 9 and 10 were substantially the same and of course, both should not have been given; one of them was sufficient and the defendant was entitled to one of them. Refused instruction No. 11 was inaccurate. It stated that if the jury believed from the evidence that Aevermann at and before the time of the accident was driving his automobile with ordinary care "and with such care as an ordinary prudent person would have used in the driving of an automobile in the same or similar circumstances", plaintiff could not recover. There was in substance a repetition of the statement that if at and before the time of the accident Aevermann was operating his automobile as an ordinary person under similar circumstances, there could be no recovery. The repetition should have been omitted. Moreover, it was corrected by defendant's instruction 7.

The judgment of the Circuit Court of Cook County is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

TAYLOR, P.J. CONCURS;
THOMSON, J. SPECIALLY CONCURRING:

I concur in the decision of this case, but do not

Wash. 2d 111, Ann. 508; Johnson v. Pendergast, 208 Ill. 324; Smith v. Illinois Bankers Ins. Co., 232 Ill. App. 328.

We think the court might notto have given instruction 8, for the reason that it attempted to summarize the various facts as disclosed by the evidence. The jury ought to be told what the law is without attempting to summarize the various facts which plaintiff claimed the evidence tended to prove.

Complaint is also made that the court erred in refusing to give instructions Nos. 9, 10 and 11 offered by defendant. Instructions Nos. 9 and 10 were substantially the same and of course, both should not have been given; one of them was sufficient and the defendant was entitled to use of them. Refused instruction No. 11 was inadmissible. It stated that if the jury believed from the evidence that defendant at and before the time of the accident was driving his automobile with ordinary care "and with such care as an ordinary prudent person would have used in the driving of an automobile in the same or similar circumstances", plaintiff could not recover. There was in evidence a repetition of the statement that if at and before the time of the accident defendant was operating the automobile as an ordinary person under similar circumstances, there could be no recovery. The repetition should have been omitted. However, it was covered by defendant's instruction 7.

The judgment of the Circuit Court of Cook County is reversed and the cause remanded for a new trial.

ISTED, J., concurring.

HEMPHILL, J., specially concurring:

I concur in the decision of this case, but in not

agree with all that is said in the majority opinion concerning the instructions.

185 - 31317

296 - 31428

PEOPLE OF THE STATE OF ILLINOIS, Appellee,	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
v.	
SHERIDAN A. BRUSEAUX, Appellant.	

Opinion filed April 6, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By these appeals the respondents seek to reverse orders of the Circuit Court of Cook County, finding them guilty of contempt of court and sentencing each of them to ten days in jail.

The record discloses that Marion Thornton, one of the relators, had filed a bill for divorce against his wife, Hazel Thornton, in the Circuit Court of Cook County; that on September 22, 1925, an interlocutory order was entered in that case that Marion Thornton, the complainant, pay to his wife $10.00 per week alimony, and it was further ordered that the care and custody of the eldest child of the parties be given to the complainant and that the care and custody of the baby, about 2½ years of age, to the defendant. Afterwards, on April 20, 1926, the defendant Hazel Thornton, filed a written motion in the divorce proceedings, supported by her affidavit, praying that a rule be entered against complainant, her husband, requiring him to show cause why he should not be punished for contempt of court in violating the order of the court by reason of the fact that he had taken the baby from

No. 18,[illegible]

[illegible] - Plaintiff

IN THE COURT OF THE STATE OF [illegible].

Appellee,

v.

[illegible] A. [illegible],

Appellant.

APPEAL FROM
CHAUTAUQUA COUNTY,
COOK DISTRICT.

Opinion filed April 6, 1927.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By these appeals the respondents seek to reverse orders of the Circuit Court of Cook County, finding them guilty of contempt of court and sentencing each of them to ten days in jail.

The record discloses that Marion Thornton, one of the relators, had filed a bill for divorce against his wife, Hazel Thornton, in the Circuit Court of Cook County; that on September 22, 1926, an interlocutory order was entered in that case that Marion Thornton, the complainant, pay to his wife $10.00 per week alimony, and it was further ordered that the care and custody of the eldest child of the parties be given to the complainant and that the care and custody of the baby, about 2½ years of age, be the defendant. Afterwards, on April 20, 1926, the defendant, Hazel Thornton, filed a written motion in the divorce proceedings, supported by her affidavit, praying that a rule be entered against complainant, her husband, requiring him to show cause why he should not be punished for contempt of court in violating the order of the court by reason of the fact that he had taken the baby from

her. On the same day the court entered an order requiring the complainant to show cause by April 30th why he should not be punished for contempt of court in taking the baby from the mother contrary to the order of court.

On May 25, 1926, the complainant filed a petition in the divorce proceedings, praying that the order of September 22, 1925, whereby the defendant was awarded alimony and the custody of the baby be vacated and set aside, and that he be given the custody of the baby. In support of this complainant filed his verified petition, wherein he set up inter alia that the defendant for several months prior to May 25th, 1926, had given herself over to adulterous practices and had been living in an open state of adultery with one Prince Kenedy; that the defendant, with the baby, had lived in a single room with Kenedy and that she was unfit to have the care and custody of the baby; that on March 30, 1926, about three o'clock in the morning, the defendant and Kenedy were arrested, because they were then living as husband and wife in an open state of adultery, and for this reason the complainant prayed that an order be entered discontinuing the alimony he had been required to pay and that the baby boy be turned over to him.

On June 14th, complainant filed his answer to the defendant's petition praying that he be adjudged in contempt of court as above stated, again setting up the above facts, and on that day the court entered three separate orders, one requiring the complainant to show cause why he should not be punished for contempt of court for taking the baby contrary to the order of September 22nd, a similar order against John Armstrong, a police officer of the City of Chicago and another

ber. On the same day the court entered an order requiring the complainant to show cause by April 20th why he should not be punished for contempt of court in taking the baby from the mother contrary to the order of court.

On May 28, 1888, the complainant filed a petition in the divorce proceedings, praying that the order of September 22, 1888, whereby the defendant was awarded alimony and the custody of the baby be vacated and set aside, and that he be given the custody of the baby. In support of this complaint and filed his verified petition, wherein he set up later also that the defendant for several months prior to May 20th, 1888, had given herself over to adulterous practices and had been living in an open state of adultery with one Frank Lewis; that the defendant, with the baby, had lived in a single room with Lewis and that she was unfit to have the care and custody of the baby; that on March 30, 1888, about three o'clock in the morning, the defendant and Lewis were arrested, because they were then living on Dearborn and Wells in an open state of adultery, and for this reason the complainant prayed that an order be entered discontinuing the alimony he had been required to pay and that the baby be turned over to him.

On June 16th, complainant filed his answer to the defendant's petition praying that to be adjudged in contempt of court as above stated, again setting up the above facts. And on that day the court entered three separate orders, one requiring the complainant to show cause why he should not be punished for contempt of court for taking the baby contrary to the order of September 22nd, a similar order against John Lewis, a police officer of the city of Chicago and another requiring a police officer of the city of Chicago and another

against Sheridan A. Bruseaux, a detective. The matter came on for hearing and on July 16th the court entered three separate orders, one discharging the police officer and the other two finding the complainant guilty of contempt of court for taking the baby on March 30, 1926, in violation of the order of September 22, 1925, and sentencing him to ten days in the county court and a similar order entered against Bruseaux. It is from these two orders that the appeals are prosecuted and they have been consolidated for hearing in this court on one record.

The record discloses that sometime after the order of September 22, 1925, was entered, complainant became suspicious of his wife and employed Bruseaux, a detective, to investigate the matter and at about three o'clock on the morning of March 30th the defendant was found living in one room in a five room flat with Prince Kenedy as his wife. When the detective on the morning of March 30th found the defendant and Kenedy in the room he called police officer Armstrong. Complainant was also notified and he, with his parents, went to the flat and they all went into the room, which was then occupied by Mrs. Thornton, the baby and Kenedy. Kenedy and Mrs. Thornton were placed under arrest, and the police officer stated that there was no place to take care of the baby and it was taken by the complainant to his mother's home. There is a dispute in the evidence as to whether Mrs. Thornton requested her husband to take the baby, in view of the fact that she was to be taken to jail or whether the baby was taken forcibly from her. The court was of the opinion that the baby was taken from the mother against her protest. It further appears that Kenedy was tried in the Municipal Court on a charge of disorderly conduct and fined $15.00. As to

against Dorothea A. Hunsecker, a detective. The matter came on for hearing and on July 10th the court entered three separate orders, one discharging the police officer and the other two finding the complainant guilty of contempt of court for taking the baby on March 30, 1922, in violation of the order of September 22, 1922, and sentencing him to ten days in the county court and a similar order entered against Hunsecker. It is from these two orders that the appellants are prosecuted and they have been consolidated for hearing in this court on one record.

The record discloses that sometime after the order of September 22, 1922, one Grace, complainant herein, complained to his wife and employed Hunsecker, a detective, to investigate the matter and at about three o'clock on the morning of March 30th the defendant was found living in one room in a five room flat with Frances Kennedy as his wife. When the detective on the morning of March 30th found the defendant and Kennedy in the room he called police officer Lunstrom. Complainant was also notified and he, with his parents, went to the flat and they all went into the room, which was then occupied by Hunsecker, the baby and Kennedy. Kennedy and Hunsecker were placed under arrest, and the police officer stated that there was no place to take care of the baby and it was taken by the complainant to his mother's home. There is a dispute in the evidence as to whether Hunsecker requested her husband to take the baby, in view of the fact that she was to be taken to jail or whether the baby was taken forcibly from her. The court was of the opinion that the baby was taken from the mother against her protest. It further appears that Kennedy was tried in the municipal court on a charge of disorderly conduct and fined $10.00. As to

what become of the charge placed against Mrs. Thornton, the record is somewhat uncertain, but it indicates that she was also found guilty and placed on probation. The evidence further shows that about the time the case was tried in the Municipal Court, both Thornton and his wife were represented by counsel in the divorce proceeding and that after a conference, Mrs. Thornton signed a stipulation agreeing that the father might continue to retain the baby and that he would be required to pay no more alimony. On April 20th following, Mrs. Thornton was represented by other counsel and she filed her petition on that day against her husband, praying that he be adjudged in contempt as above stated, and it appears that about that time complainant returned the baby to her.

Considerable has been stated in the briefs filed as to whether the proceeding in the two appeals involved a civil or criminal contempt and also whether the proceeding as to the detective Bruseaux was void because no petition or affidavit was filed against him setting up any reason why he should be adjudged in contempt, and therefore, the court had no jurisdiction as to him. On the trial of the case the matter was heard as though it was a civil contempt. It was not suggested on the hearing that the husband Thornton should be dischargedon his sworn answer filed to the petition. Nor was it suggested that the respondent Bruseaux should be discharged on his sworn testimony but all parties treated the matter as though it were a civil contempt. We think that as to the respondent, Bruseaux, the court was without jurisdiction, since there was neither petition nor affidavit filed, setting up what acts it was claimed constituted the contempt. Franklin Union v. People, 220 Ill. 355;

what caused of the change placed against Mrs. Thornton, the record is somewhat uncertain, but it indicates that she was also found guilty and placed on probation. The evidence further shows that about the time the case was tried in the Municipal Court, both Thornton and his wife were represented by counsel in the divorce proceeding and that after a conference, Mrs. Thornton signed a stipulation agreeing that the father might continue to visit the baby and that he would be required to pay no more alimony. On April 20th following, Mrs. Thornton was represented by other counsel and she filed her petition on that day against her husband, praying that he be adjudged in contempt as above stated, and it appears that about that time complainant returned the baby to her.

Considerable has been stated in the briefs filed on behalf of the proceeding in the two appeals involved - civil or criminal contempt and also whether the proceeding on the dispositive demurrer was void because no petition or affidavit was filed against him setting up any reason why he should be adjudged in contempt, and therefore, the court had no jurisdiction on to him. On the trial of the case the matter was heard as though it was a civil contempt. It was not suggested on the hearing that the husband Thornton should be discharged on his own answer filed to the petition. Nor was it suggested that the respondent Thornton should be discharged on his own testimony but all parties treated the matter as though it were a civil contempt. We think that on the respondent, however, the court was without jurisdiction, since there was neither petition nor affidavit filed, nothing on which ever it was claimed constituted the contempt. Franklin Union v. People, 161 Ill. 333;

Hake v. People, 230 Ill. 174. But we do not wish to place our decision upon this ground, because we are clearly of the opinion that there was no contempt of court shown. When the mother of the child and Prince Kenedy were found living in an open state of adultery, and when the evidence unquestionably shows this to be the fact, there was nothing within reason to do but to take the child as was done. It was three o'clock in the morning and an order of the Circuit Court in the divorce proceedings could not have been had. While it would have been more proper for the husband, Thornton, to have gone as soon as possible into the Circuit Court and presented the facts and have requested an order that he be given the child, yet his failure to do so is somewhat excusable, as it appears from the evidence that the mother of the child, after conferring with her counsel agreed to give the father the child and to release him from further payment of alimony. Later on the respondent, Thornton, did move the court to give him the custody of the child and that he be relieved from further payment of alimony, but this motion was denied and we think erroneously so for the reasons already stated.

The two appeals are erroneously entitled, "People of the State of Illinois, Appellee against Sheridan A. Bruseaux, Appellant, and People of the State of Illinois, Appellee against Marion Thornton, Appellant." They should have been entitled as in the divorce suit, Hake v. People, supra. The people were in no way involved and the burden of following such appeals

Lake v. Lemle, 280 Ill. 374. But we do not wish to place our decision upon this ground, because we are clearly of the opinion that there was no contempt of court shown. When the mother of the child and Prince Lemmy were found living in an open state of adultery, and when the evidence unquestionably shows this to be the fact, there was nothing within reason to do but to take the child as was done.

It was three o'clock in the morning and an order of the Circuit Court in the divorce proceedings would not have been had. While it would have been more proper for the husband, Therston, to have gone as soon as possible into the Circuit Court and presented the facts and have requested an order that he be given the child, yet his failure to do so is somewhat reasonable, as it appears from the evidence that the mother of the child, after conferring with her counsel agreed to give the father the child and to release him from further payment of alimony. Later on the respondent, Therston, did move the court to give him the custody of the child and thus be to relieved from further payment of alimony, but this motion was denied and no final determination on that the question already stated.

The two opinions are extremely entitled, "People of the State of Illinois, appellee against Dorothy A. Therston, appellant, and People of the State of Illinois, appellee against Lorin Therston, appellant." They should have been entitled as in the divorce suit, Lois v. Lois, supra. The people were in no way involved and the duties of filing such papers

should not have been put on the State's Attorney.

The two orders appealed from are reversed.

ORDERS REVERSED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

100 - 31229

THE LINDEN COMPANY, a corp., Plaintiff in Error, v. DAVID G. JOYCE, Defendant in Error.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed April 6, 1927.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff is in the business of furnishing interior decorations and other matters connected therewith. It brought this action to recover "for the reasonable, usual and customary value of goods and merchandise furnished and delivered by plaintiff to defendant, and work and labor performed by plaintiff for defendant, at defendant's special instance and request, under verbal contracts," entered into between the parties, as set forth by the plaintiff in its statement of claim. The amount of the plaintiff's bill, as set out item by item, was $104,369.46. Various payments on account were acknowledged, aggregating $80,080, leaving a balance of $24,289.46, as the amount sued for. By his affidavit of merits the defendant denied that the amounts making up plaintiff's claim were the reasonable, usual and customary values of the goods and merchandise furnished, or the labor performed, and alleged further that on May 3, 1922, there was an adjustment of the account made between the parties concerning all the matters involved, and a settlement had between them in accordance with such adjustment, whereby

100 - 21820

THE LUMBER COMPANY, a corp., Plaintiff in Error, v. DAVID G. JOYCE, Defendant in Error.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed April 6, 1927.

MR. JUSTICE TH'SEON delivered the opinion of the court.

The plaintiff is in the business of furnishing interior decorations and other matters connected therewith. It brought this action to recover "for the reasonable, usual and customary value of goods and merchandise furnished and delivered by plaintiff to defendant, and work and labor performed by plaintiff for defendant, at defendant's special instance and request, under verbal contracts," entered into between the parties, as set forth by the plaintiff in its statement of claim. The amount of the plaintiff's bill, as set out item by item, was $104,322.46. Various payments on account were acknowledged, aggregating $80,000, leaving a balance of $24,322.46, as the amount sued for. By his affidavit of merits the defendant denied that the amounts making up plaintiff's claim were the reasonable, usual and customary values of the goods and merchandise furnished, or the labor performed, and alleged further that on May 5, 1926, there was an adjustment of the accounts made between the parties concerning all the matters involved, and a settlement had between them in accordance with such adjustment, whereby

the defendant paid the plaintiff the sum of $40,000, which the plaintiff had accepted in full satisfaction of all its claims. The cause went to trial before a jury and at the close of all the evidence the trial court sustained the motion of the defendant for an instructed verdict in his favor, and pursuant thereto, the court instructed the jury to find the issues for the defendant. Such a verdict was returned and judgment entered upon it. To reverse that judgment, the plaintiff has perfected this appeal.

In support of its appeal, the plaintiff contends that the payment of the $40,000 may not properly be given the effect of releasing the defendant from the liability of the balance claimed by the plaintiff, because the evidence shows that there was no reasonable, bona fide dispute as to the amount due, except as to certain comparatively trivial items. It is the plaintiff's position that if a certain sum is claimed to be due on an account, and there is no bona fide dispute as to a portion thereof, the payment of less than the admitted portion cannot be construed as a release of the whole of the admitted portion. A number of authorities are submitted in support of that contention. It will not be necessary to refer to those authorities. They are not questioned by the defendant, nor does the latter contest the proposition urged, as stated above. The position of the defendant is, however, that this proposition is not applicable to the facts as disclosed by the evidence. We have carefully examined all the evidence in the record, and in our opinion, it abundantly supports the defendant's contention and the

the defendant paid the plaintiff the sum of $60,000, which the plaintiff had accepted in full satisfaction of all its claims. The cause went to trial before a jury and at the close of all the evidence the trial court sustained the motion of the defendant for an instructed verdict in its favor, and pursuant thereto, the court instructed the jury to find the issues for the defendant. Such a verdict was returned and judgment entered upon it. We reverse that judgment, the plaintiff has perfected this appeal.

In support of its appeal, the plaintiff contends that the payment of the $60,000 may not properly be given the effect of releasing the defendant from the liability of the balance claimed by the plaintiff, because the evidence shows that there was no reasonable, bona fide dispute as to the amount due, except as to certain comparatively trivial items. It is the plaintiff's position that if a certain sum is claimed to be due as an account, and there is no bona fide dispute as to a portion thereof, the payment of less than the admitted portion cannot be construed as a release of the whole of the claimed position. A number of authorities are submitted in support of that contention. It will not be necessary to refer to them anything. They are not qualified by the facts, nor are the latter against the proposition urged, as stated above. The position of the defendant is, however, that this proposition is not applicable to the facts as disclosed by the evidence. We have carefully examined all the evidence in the record, and in our opinion, it abundantly supports the defendant's contention and the trial court was in accordance with such evidence, which

action of the trial court in allowing his motion at the close of all the evidence.

The record shows that the plaintiff did some work on the house of the defendant's mother at Clinton, Iowa, in 1930 and 1931. This work was entirely finished and paid for in full, and is not involved here. There was later a comparatively small amount of additional and extra work done out there, which does seem to be involved in the items here sued for. The plaintiff then was given entire charge of moving the furniture and other effects of the defendant, from one apartment to another, in the City of Chicago; making certain alterations in the apartment to which the defendant was moving and attending to the entire furnishing of the apartment. The evidence further shows that the defendant purchased an old house in Miami, Florida, and engaged the plaintiff to remodel it completely and furnish it throughout. The account here involved has to do, for the most part, with these latter two matters. The last of them, - the work at Miami, - was completed early in 1932, and the plaintiff began to press for the payment of its account.

The record shows that at this time the plaintiff was very hard pressed for ready cash. It was apparently going along on a small working capital, much of which was put into this work which had been done for the defendant. The president of the plaintiff company testified that his concern, which was owned by only three or four individuals, had a rather hard time through the War period and in the early part of 1932, they found themselves with practically

action of the trial court in allowing his action at the close of all the evidence.

The record shows that the plaintiff did some work on the house of the defendant's mother at Ottatna, Iowa, in 1880 and 1881. This work was entirely finished and paid for in full, and is not involved here. There was later a comparatively small amount of additional and extra work done out there, which does seem to be involved in the items here sued for. The plaintiffs then was given entire charge of moving the furniture and other effects of the defendant, from one apartment to another, in the City of Chicago, making certain alterations in the apartment to suit the defendant was moving and attending to the entire furnishing of the apartment. The evidence further shows that he certainly purchased an old house in Miami, Florida, and engaged the plaintiff to remodel it completely and furnish it throughout. The amount here involved has to do, for the most part, with these latter two matters. The last of them, - the work at Miami, - was completed early in 1902, and the plaintiff began to press for the payment of his account.

The record shows that at this time the plaintiff was very hard pressed for ready cash. It was apparently going along on a small working capital, much of which was put into this work which had been done for the defendant. The president of the plaintiff company testified that his account, which was owed by only three or four individuals, had a rather hard time through the war period and in the early part of 1902. Any fund transactions with practically

all their working capital tied up in this work for the defendant. It was the plaintiff's custom to receive payments from time to time on the work it did, amounting to 85 per cent. For some reason that was not done in the case of the work for the defendant. The consequence was the plaintiff found itself hard pressed for the payment of the accounts it owed to others and they were under the necessity of bringing about a payment of their account from the defendant, or being in danger of bankruptcy. This being the situation, it urged upon the defendant's representatives an immediate settlement of this account. These representatives of the defendant met such efforts with the complaint that the account involved over-charges, both as to certain labor items and as to certain material items. The plaintiff submitted evidence tending to show that the first complaints of this kind were made in December, 1921. The representatives of the defendant testified that they began making these objections of over-charges much earlier than that.

The negotiations between the parties for a settlement of this account involved a number of conferences. One George, a creditor of the plaintiff, whose account with it was made up, at least in part, of items which seem to have been installed by the plaintiff in the defendant's house at Miami, conferred with the defendant's representatives a number of times, in an effort to effect a settlement of the account, between the plaintiff and the defendant. At one stage of these negotiations the plaintiff urged that their controversy be submitted to the Association of Commerce Bureau of Arbitration. This the defendant's representatives declined to do. At one stage of the negotiations the defendant's representatives

all their working capital tied up in this work for the defendant. It was the plaintiff's custom to receive payments from time to time on the work it did, amounting to 85 per cent. For some reason that was not done in the case of the work for the defendant. The consequence was the plaintiff found itself hard pressed for the payment of the accounts it owed to others and they were under the unpleasantly of bringing about a payment of their accounts from the defendant, or being in danger of bankruptcy. This being the situation, it urged upon the defendant's representatives an immediate settlement of this account. These representatives of the defendant met such efforts with the complaint that the account involved over-charges, both as to certain labor items and as to certain material items. The plaintiff submitted evidence tending to show that the first complaints of this kind were made in December, 1903. The representatives of the defendant testified that they began making these objections of over-charges much earlier than that.

The negotiations between the parties for a settlement of this account involved a number of conferences. One George, a creditor of the plaintiff, whose account with it was made up, at least in part, of items which seem to have been installed by the plaintiff in the defendant's house at Ithaca, conferred with the defendant's representatives a number of times, in an effort to effect a settlement of the account between the plaintiff and the defendant. At one stage of these negotiations the plaintiff urged that their controversy be submitted to the immediate decision of Arbitrators. This the defendant's representatives declined to do. At one stage of the negotiations the defendant's representatives

stated that they would pay the plaintiff $32,000 for a settlement of the account in full. At this time the balance which the plaintiff claimed was due it, was approximately $64,000. The plaintiff declined to consider the offer of $32,000 and made a counter offer, agreeing to accept $50,000, "because we cannot afford to start suit and wait." This offer was declined. In the course of these negotiations the defendant made the plaintiff two payments of $5,000 each, one on March 6, 1932, and the other on March 21, 1932. In each instance the plaintiff signed a receipt in which it was agreed that such payment was not to impair, to any extent, the right of the defendant to demand a proper accounting, and to object to the quality of material supplied or the prices charged by the plaintiff. Finally, on one of the first days of May, Mr. George, who with representatives of the plaintiff, had previously made several visits to the defendant's offices and discussed a settlement with the defendant's representatives, to no purpose, made another call upon defendant's representatives, alone, and discussed the situation with them further. On that occasion an offer of settlement, on a basis of a further payment of $40,000, was suggested in behalf of the defendant, and Mr. George said he would submit it to the plaintiff. He did so and the individuals making up the plaintiff company, discussed it and concluded to accept it. The defendant's office was advised to that effect and on the following day a check for $40,000 was delivered to the plaintiff in behalf of the defendant; and when the plaintiff accepted it one of theofficers of that company executed a receipt in which it was recited that the plaintiff "received of David G. Joyce, pursuant to negotiations and settlement of

stated that they would pay the plaintiff $50,000 for a settlement of the account in full. At this time the balance which the plaintiff claimed was due it, was approximately $84,000. The plaintiff declined to consider the offer of $50,000 and made a counter offer, agreeing to accept $80,000, "because we cannot afford to start suit and wait." This offer was declined. In the course of these negotiations the defendant made the plaintiff two payments of $2,000 each, one on March 8, 1922, and the other on March 21, 1922. In each instance the plaintiff signed a receipt in which it was agreed that such payment was not to impair, in any extent, the right of the defendant to demand a proper accounting, and to object to the quality or material supplied or the prices charged by the plaintiff. Finally, on one of the first days of May, Mr. George, who with representatives of the plaintiff had previously made several visits to the defendant's offices and discussed a settlement with the defendant's representatives, to no purpose, made another call upon defendant's representatives, alone, and discussed the situation with them further. On that occasion an offer of settlement, on a basis of a further payment of $10,000, was suggested in behalf of the defendant, and Mr. George said he would submit it to the plaintiff. He did so and the individuals making up the plaintiff company, discussed it and concluded to accept it. The defendant's office was advised to that effect and on the following day a check for $10,000 was delivered to the plaintiff in behalf of the defendant and when the plaintiff accepted it was of the opinion of that company executed a receipt in which it was recited that the plaintiff "received of David S. Hope, payment in liquidation and settlement of

disputes over work done, charges for labor and prices for material on contracts with him concerning his apartment at 232 East Walton Place, Chicago, and his home at Miami, Florida (and as part of the lump sum of Forty Thousand Dollars this day paid to us), full payment and satisfaction of all claims of every kind whatsoever that The Linden Company has in connection with the contracts and work and material furnished in and about either of said premises." It appears that the plaintiff executed a similar receipt acknowledging full payment and satisfaction of all claims it might have in connection with any work done at the home of defendant's mother, at Clinton, Iowa.

In our opinion, the evidence is clearly to the effect that there was a bona fide dispute as to whether the charges made by the plaintiff were reasonable and proper, both as to labor and materials. We are further of the opinion that this evidence clearly shows that the items called in question were not trivial but were substantial both in number and amount. There is no evidence in the record, which, in our opinion, either shows or tends to show that the representatives of the defendant or that the defendant himself, at any time admitted that he owed the plaintiff more than the aggregate of the payments which had been made, and the final payment of $40,000. The evidence submitted by the plaintiff shows that on the occasion of one of the calls made by Mr. George, with one or two representatives of the plaintiff, the plaintiff was claiming that a balance of $60,000 was due it, and the defendant's representatives were offering to pay $32,000 in

disputes over work done, charges for labor and prices for material on contracts with his concerning his apartment at 2000 East 71st Place, Chicago, and his home at Miami, Florida (and as part of the lump sum of "Forty Thousand Dollars this day paid to me). Full payment and satisfaction of allegations of every kind whatsoever that the Lindsay company has in connection with the contracts and work and material furnished in and about either of said premises." It appears that the plaintiff executed a similar receipt acknowledging full payment and satisfaction of all claims it might have in connection with any work done at the home of defendant's mother, at Clinton, Iowa.

In our opinion, the evidence is clearly to the effect that there was a bona fide dispute as to whether the charges made by the plaintiff were reasonable and proper, both as to labor and materials. In our further of the opinion that this evidence clearly shows that the items called in question were not trivial but were substantial both in number and amount. There is no evidence in the record, which, in our opinion, either shows or tends to show that the representatives of the defendant or that the defendant himself, at any time entitled that he owed the plaintiff more than the expenses of the personal which had been made, and the final payment of $40,000. The evidence submitted by the plaintiff shows that on the occasion of one of the calls made by Mr. George, with one or two representatives of the plaintiff, the plaintiff was claiming that a balance of $80,000 was due it, and the defendant's representatives were willing to pay $20,000 in

settlement of the entire controversy, and Mr. Wagner, of the plaintiff company, replied that they could not accept any such settlement, and one of the representatives of the defendant exhibited a telegram, from the defendant, who apparently was in Miami, which had been sent to his attorney, and in which he, said in effect: "If you are attempting a settlement with The Linden Company there will have to be a material reduction. I especially question the price on the furniture that was made to order." One of the representatives of the defendant, who, according to the evidence, had entire charge of his accounts and attended to the payment of his bills, testified that he was complaining of items which he contended were over-charged, from the early fall of 1921, and that he did not receive a complete statement of the defendant's bill from the plaintiff until March or April, 1922, and that in discussing the various items appearing on the statement, as then submitted, with the plaintiff's representatives, he took exception to practically all of the items involved.

The plaintiff's statement of claim is on an unliquidated account and the proof abundantly supports the fact that such was the nature of its claim. In our opinion the evidence shows, as above stated, that the dispute made by the representatives of the defendant was both bona fide in character and material as to substance. The plaintiff saw fit to settle its contested claim for a further cash payment of $40,000, in addition to the payments which had previously been made. That payment was, therefore, a complete satisfaction of the debt. Rosenmueller v. Lampe, 89 Ill. 212; Ennis v. Pullman Palace Car Co., 165 Ill. 161; Canton Coal Co.

settlement of the motion counterclaim, and Mr. Bagwell, of the plaintiff company, replied that they could not accept any such settlement and one of the representatives of the defendant established a telephone. From the defendant, the opportunity was in fact, which had been sent to his attorney, and in which he said in effect: "If you are attempting a settlement with the Lydon Company there will have to be a material reduction. I especially question the price on the furniture that was made to order." One of the representatives of the defendant, who, according to the evidence, had neither charge of his accounts and attended to the payment of his bills, testified that he was complaining of items which he contended were over-charged, from the early fall of 1923, and that he did not receive a complete statement of the defendant's bill from the plaintiff until March or April, 1924, and that in discussing the various items appearing on the statement, he then understood, with the plaintiff's representatives, he then undertook to practically all of the items involved.

The plaintiff's statement of claim is on an unliquidated account and the proof accordingly requires the fact that such was the nature of its claim. In our opinion the evidence shows, as above stated, that the dispute made by the representatives of the defendant was both bona fide in character and material as to substance. The plaintiff saw fit to settle its contested claim for a further cash payment of $40,000, in addition to the payments which had previously been made. That payment was, therefore, a complete satisfaction of the debt. Pennsylvania v. Lane, 52 Ill. 473; Smith v. Tilton Paper Co., 182 Ill. 181; Sayre Coal Co.

v. Parlin, 215 Ill. 244; Kall v. Block, 319 Ill. 339. The situation is not changed by reason of the fact that the plaintiff found itself in a precarious financial position, and was induced to accept the settlement because it was hard pressed for ready cash and working capital, or for any other reason not amounting to fraud and deception on the part of the defendant or his representatives, which is not claimed. As pointed out in United States v. Child & Co., 12 Wallace 232, if the contrary position were sound, no party could safely pay, by way of compromise, any sum less than what was claimed by him, for the compromise would be void as obtained by duress; provided only a creditor accepted the amount offered as settlement at a time when he was hard pressed for money. To the same effect is Gage v. Parmalee, 87 Ill. 329, where a creditor sought relief from a settlement which had been made with a debtor, claiming that his mental condition and distress were such that an unjust advantage was taken of him in enforcing the settlement which had been made. In McCormick v. City of St. Louis, 166 Mo. 318, the court said: "If parties could plead in discharge of their contracts, that they were forced into them by reason of some financial strain brought about by their contracts with others, then but few contracts would be worth the paper used to have them evidenced. All compromise agreements are the result of a desire to avert or avoid some threatened or possible embarrassment or inconvenience. Otherwise compromises would never be effected." In Hackley v. Headley, reported in 45 Mich. 569, and again in 50 Mich. 43, a plaintiff claimed that his pecuniary straits constituted such duress as should relieve him from a settlement he had

v. Durkin, 216 Ill. 244; Hall v. Hall, 219 Ill. 238.
The situation is not changed by reason of the fact that the plaintiff found itself in a precarious financial condition, and was induced to accept the settlement because it was hard pressed for ready cash and working capital, or for any other reason not amounting to fraud and duress on the part of the defendant or his representatives, which is not claimed. As pointed out in United States v. Mills, 172 U.S. 524, if the monetary benefits were equal, no party could safely say, by way of compromise, any less than what was claimed by him, for the compromise would be void as signed by duress; provided only a creditor accepted the amount offered as settlement at a time when he was hard pressed for money. To the same effect is Hall v. Hallett, 97 Ill. 240, where a creditor sought relief from a settlement which had been made with a debtor, claiming that his mental condition and distress were such that he without advantage was taken of his in enforcing the settlement which had been made. In Underwood v. City of St. Louis, 108 Mo. 518, the court said: "If parties could plead in defeasance of their contracts, that they were forced into them by reason of some financial straits brought about by their contracts with others, then but few contracts would be worth the paper used to have them evidenced. All compromise agreements are the result of a desire to avert or avoid some threatened or possible controversy or inconvenience. Otherwise compromises would never be effected." In Lackey v. Headley, reported in 68 N.E. 558, and again in 80 N.E. 61, a plaintiff claimed that his peculiarly mental condition

such duress as should relieve him from a settlement of his

made of a disputed account. The court there well said that "the validity of negotiations, according to this claim, must be determined, not by defendant's conduct, but by the plaintiff's necessities * * * But this would be a most dangerous as well as a most unequal doctrine, and if accepted, no one could well know when he would be safe in dealing on the ordinary terms of negotiation with a party who professed to be in great need."

In the Hackley case, there was an amount due from the defendant debtor to the plaintiff creditor which was undisputed. Nevertheless, the court pointed out, the defendant deliberately acted in bad faith and made claims he knew to be unfounded for the purpose of getting a settlement for less than he admitted he owed the plaintiff, which settlement he was able to accomplish because of the plaintiff's necessities. That, in our opinion, is not at all the case at bar. Here, it is true the plaintiff found itself laboring under financial stress which moved it to accept the settlement offered, but we find no evidence to indicate that the amount paid in settlement was less than the defendant admitted he owed.

For the reasons we have given, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

made of a disputed account. The court there well said that "the validity of negotiations, according to this claim, must be determined, not by defendant's conduct, but by the plaintiff's necessities . . . ". But this would be a most dangerous as well as a most unequal doctrine, and if accepted, no man could well know when he would be safe in dealing on the ordinary terms of negotiation with a party who happened to be in great need."

In our judgment, there was no error in the defendant below to the plaintiff creditor which was inadequate. Nevertheless, the court pointed out, the evidence definitively noted in bad faith and made claim he knew to be unfounded for the purpose of getting a settlement for less than he admitted he owed the plaintiff, which settlement he was able to accomplish because of the plaintiff's necessities. That, in our opinion, is not at all the case at bar. Here, it is true the plaintiff found itself labouring under financial straws which moved it to accept the settlement offered, but we find no evidence to indicate that the account held in settlement was less than the defendant admitted to owed.

For the reasons we have given, the judgment of the municipal court is affirmed.

JUDGE WILSON.

Filed: F.J. Lee ; Concur: J. Prior.

118 - 31247

SAMUEL LANSKI, Appellee,	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	)	
IRVING G. ZAZOVE, Appellant.	)	

Opinion filed April 6, 1927.

MR. JUSTICE THOMSON delivered the opinion of the court.

Judgment was taken by confession on a judgment note against the defendant for $1748.00 in the Municipal Court of Chicago. Within 30 days after the judgment was entered, the defendant moved the court to vacate the judgment, and submitted his affidavit in support of the motion. The defendant's motion was overruled and by this appeal he seeks to reverse the order by which that was done.

In support of his appeal the defendant contends that the affidavit submitted by him made out a meritorious defense as against the action brought on his note, and further, that the trial court erred in denying his motion to vacate the judgment, because the record shows that the attorney in the cognovit exceeded the authority set out in the warrant, in that the attorney stipulated that no bill in equity should be filed to seek the vacating of the judgment, and also in acknowledging judgment for a sum including $96.00 as attorney's fees, although the warrant merely provided for a reasonable fee. Inasmuch as the defendant

Appellee,	APPEAL FROM
v.	MUNICIPAL COURT
TURLING G. BANKS,	OF CHICAGO.
Appellant.	

Opinion filed April 6, 1927.

MR. JUSTICE THOMSON delivered the opinion of the court.

Judgment was taken by confession on a judgment note against the defendant for $1766.00 in the Municipal Court of Chicago. Within 30 days after the judgment was entered, the defendant moved the court to vacate the judgment, and submitted his affidavit in support of the motion. The defendant's motion was overruled and by this appeal he seeks to reverse the order by which that was done.

In support of his appeal his attorney contends that the affidavit submitted by his made out a meritorious defense to plaintiff the action brought on his note, and further, that the trial court erred in denying his motion to vacate the judgment, because the record shows that the attorney in the confession exceeded the authority set out in the warrant. In that the attorney stipulated that no bill in equity should be filed to set the vacating of the judgment, and also in acknowledging judgment for a sum including $50.00 as attorney's fees although the warrant merely provided for a reasonable fee. Inasmuch as the defendant

has not seen fit to preserve any of these matters by a bill of exceptions, they are not properly before this court for review. To authorize the consideration of an alleged error on appeal, which requires an inspection of the warrant of attorney or the note upon which a judgment by confession has been entered in the Circuit or Superior Courts, those documents must be preserved by a bill of exceptions. Magher v. Howe, 12 Ill. 378; Waterman v. Caton, 85 Ill. 94; Boyles v. Chytraus, 175 Ill. 370. This, however, is not necessary in the case of an appeal from a judgment entered in the Municipal Court of Chicago where the note and warrant of attorney are attached to the statement of claim. Flew v. Board, 274 Ill. 232. They were so attached in this case. But if the defendant desired to preserve for review the other matters which the trial court necessarily considered in passing upon his motion to vacate the judgment, he should have preserved his motion and the affidavit he presented in support of it by a bill of exceptions. The fact that they appear in the common law record, can avail nothing. Austin v. Lott, 38 Ill. 518; Peter Hand Brewing Co. v. Hauseda, 210 Ill. App. 153; Patton v. Young, 233 Ill. App. 515. Without a bill of exceptions, this court may not only not take these matters into consideration, but it is impossible for it to know what the trial court considered in ruling on the motion to vacate.

In contending that this court may consider the errors urged, even though there is no bill of exceptions, defendant treats his motion as though it were made under section 21 of the Municipal Court Act, and cites cases

has not been its to preserve any of these matters by a bill of exceptions, they are not properly before this court for review. To authorize the consideration of an alleged error on appeal, which requires an inspection of the warrant of attorney or the note upon which a judgment by confession has been entered in the Circuit or Superior Courts, these documents must be preserved by a bill of exceptions. Mosher v. Hood, 19 Ill. 576; Waterman v. Tatum, 55 Ill. 94; Boylan v. Chrisman, 175 Ill. 270. This, however, is not necessary in the case of an appeal from a judgment entered in the municipal court of Chicago where the note and warrant of attorney are attached to the statement of claim. Klein v. Ehrich, 274 Ill. 238. They were so attached in this case. But the defendants desired to preserve for review the other matters which the trial court peremptorily sustained in granting the motion to strike the pleadings. He should have preserved his motion and the affidavit he presented in support of it by a bill of exceptions. The fact that they appear in the common law record, can avail nothing. Martin v. Lott, 58 Ill. 80; Peter Hand Brewing Co. v. Kennedy, 210 Ill. App. 158; Potter v. Tumey, 255 Ill. 422. Without a bill of exceptions, this court may not only not take these matters into consideration, but it is impossible for it to know what the trial court's ruling in striking on the motion or vice versa.

In concluding that this court may consider the errors urged, even though there is no bill of exceptions, defendant treats his motion as though it were made under section 21 of the municipal Court Act, and cites cases

applicable to that sort of a situation. This contention is clearly untenable. Defendant's motion was made and must be treated, as a motion made in the course of the original proceeding. It was addressed to the discretion of the trial court, and this court has no means of ascertaining whether the trial court, in any measure, abused its discretion, without having preserved, by bill of exceptions, everything that was considered by that court in connection with the hearing on the motion.

The defendant having made his motion to vacate the judgment entered against him by confession, even if the attorney who appeared in the cognovit, waived more than he was authorized to do by the warrant of attorney, in respect to the defendant's right to have the judgment vacated, it is not shown by this record that he has suffered any harm in consequence of it. Rather, the record shows the contrary. Long v. Coffman, 30 Ill. App. 537; Hanson v. Schlessinger, 125 Ill. 230.

For the foregoing reasons, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

applicable to the case of a plaintiff. This construction is clearly unreasonable. Defendant's motion was made and must be treated, as a motion made in the course of the original proceeding. It was addressed to the discretion of the trial court, and this court has no means of ascertaining whether the trial court, in its opinion, abused its discretion, without having presented, by bill of exceptions, everything that was considered by that court in connection with the hearing on the motion.

The defendant having made his motion to vacate the judgment entered against him by confession, even if the attorney who appeared in the capacity, varied more than he was authorized to do by the warrant of attorney, in no part is the defendant's right to have the judgment vacated, it is not shown by this record that he has suffered any harm in consequence of it. Rather, the record shows the contrary. Lunn v. Hefner, 76 Ill. App. 627; Brown v. Bateman, 148 Ill. 351.

For the foregoing reasons, the judgment of the Municipal Court is affirmed.

AFFIRMED.

McGURN, P.J. and O'CONNOR, J. concur.

139 - 31269

McLANE VAN INGEN, doing business as E. H. VAN INGEN & CO., Appellant, v. SAMUEL A. SNITZER, and SAMUEL A. SNITZER, INC., a corp., Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed April 6, 1927.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Van Ingen, brought this action against the defendants to recover a balance claimed to be due on an open account, this balance consisting of certain items of interest aggregating $416.27. This interest had been charged up against the account of the defendants with the plaintiff, on over-due balances. The plaintiff was located in New York and the defendants in Chicago. A stipulation was entered into between the parties, "for the purpose of mitigating expenses * * * and to avoid the taking of depositions," and for the further reason, as stated in the stipulation, that the facts stipulated were undisputed, to the effect that the controversy between them had arisen as a result of the sale of merchandise by the plaintiff to the defendants over a period beginning in September, 1919, and extending to October, 1923. In the stipulation it was admitted that the defendants owed the plaintiff the sum of $617.88, leaving a balance in dispute amounting to $561.31. Involved in the latter sum were

MOLAN VAN ZANDT, doing business as E. E. VAN ZANDT & CO., Appellant,	
v.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
ALBERT A. SPITZER, and ARTHUR A. SPITZER, INC., a corp., Appellee.	

Opinion filed April 6, 1937.

MR. JUSTICE VIDMER delivered the opinion of the court.

The plaintiff, Van Zandt, brought this action against the defendants to recover a balance claimed to be due on an open account, this balance consisting of certain items of interest aggregating $612.37. This interest had been charged up against the account of the defendants with the plaintiff, on over-due balances. The plaintiff was located in New York and the defendants in Chicago. A stipulation was entered into between the parties, "for the purpose of eliminating expenses " " " and to avoid the taking of depositions," and for the further reason, as stated in the stipulation, that the facts stipulated were undisputed, to the effect that the conversations between them had arisen as a result of the sale of merchandise by the plaintiff to the defendants over a period beginning in September, 1929, and extending to October, 1932. In the stipulation it was admitted that the defendants owed the plaintiff the sum of $2117.08, leaving a balance in dispute amounting to $1000.31. Involved in the latter sum were

certain discounts and credits claimed by the defendants, which the plaintiff "for the purpose of expediting the adjustment of this case," conceded, leaving the amount in dispute between the parties at the sum of $499.15. It was further stipulated that in October 1924, the defendants employed an accountant to audit their books to ascertain the exact amount due to the plaintiff, and if possible reconcile the defendants' account with the detailed statement which the plaintiff had submitted; that the auditor so employed accounted for the difference existing between the parties by indicating a disallowance of certain discounts and credits by the plaintiff (here conceded by him) and by the interest charges which the plaintiff had made on past due balances, (here sued for by the plaintiff). These interest charges, as above stated, amounted to $499.15. The stipulation entered into by the parties concluded as follows: "The only controversy between the parties hereby submitted to the court for determination are: (1) Whether the plaintiff is entitled to charge the defendant interest on the sums past due, and (2) if interest is chargeable, at what rate?"

The depositions submitted in behalf of the plaintiff included a long line of correspondence, beginning as early as October, 1920, and continuing throughout the period of the dealings between the parties, containing appeals directed to the defendants by the plaintiff, some of them to Snitzer individually and some to Snitzer, Inc., urging some substantial remittance to apply to the account which it would seem from this correspondence was always substantially in arrears.

certain discounts and credits claimed by the defendants, with the plaintiff "for the purpose of expediting the adjustment of this case," conceded, leaving the amount in dispute between the parties at the sum of $[illegible]. It was further stipulated that in October 1[illegible], the defendants employed an accountant to audit their books to ascertain the exact amount due to the plaintiff, and if possible reconcile the defendants' account with the detailed statement which the plaintiff had submitted; that the auditor so employed commenced for the differences existing between the parties by indicating a disallowance of certain discounts and credits by the plaintiff (here conceded by him) and by the interest charges which the plaintiff had made on past due balances, (here used for by the plaintiff). These interest charges, as above stated, amounted to $[illegible]. The stipulation proceeded into by the parties concluded as follows: "The only controversy between the parties hereby submitted to the court for determination are: (1) Whether the plaintiff is entitled to charge the defendant interest on the same past due, and (2) If interest is chargeable, at what rate."

The exposition submitted in behalf of the plaintiff included a long line of correspondence, beginning as early as October, 1[illegible], and continuing throughout the period of the dealings between the parties, containing specific directed to the defendants by the plaintiff, some of them to Mr[illegible] [illegible] and some to Mr[illegible], Inc., trying some satisfactory settlement to apply to the account which it would seem that correspondence was always subsequently in arrears.

In one such letter from the plaintiff to Snitzer, in May, 1921, the plaintiff stated among other things that $70.44 of the amount due at that time, was for interest, "the purchases having averaged due net Aug. 4th, 1920 and payment Feb.10, 1921, or 120 days after the account was due net." This letter also enclosed a statement of a later account which the plaintiff wrote "was due net Feb. 1st, 1921, and has been running on interest since that date." It is neither shown nor claimed that at any time throughout this period, any protest was made to the plaintiff in the matter of these interest charges. On the contrary, there were some payments made on this account, from time to time, and assurances on the part of Snitzer, Inc., by Snitzer personally, that they would do their "very utmost to get this account cleaned up in a very short time."

In putting in his case the plaintiff called Snitzer as a witness under Section 33 of the Municipal Court Act, and after a few preliminary questions, Snitzer admitted that all the bills of his concern, with the plaintiff, "according to the records," were paid after they became due. He was then asked whether it was not a fact that some of these bills were paid as much as a year and a half or two years after they became due. An objection was interposed, on the ground that this was not proper cross-examination under section 33, the purpose of that section being to procure such evidence or testimony as the party calling the witness was not able to produce by his own witnesses. The court sustained the objection. We know of no such limitation upon the provisions of that section. In our opinion, the objection interposed was untenable and it should have been overruled.

In one such letter from the plaintiff to Dalton, in May, 1951, the plaintiff stated among other things that $70.44 of the amount due at that time, was for interest, "the purchaser having averaged due not Aug. 4th, 1950 and payment Feb.10, 1951, or 190 days after the account was due not." This letter also enclosed a statement of a later account with the plaintiff wherein "was due not Feb. 1st, 1951, and has been running on interest since that date." It is neither shown nor claimed that at any time throughout this period, any protest was made to the plaintiff in the matter of these interest charges. On the contrary, there were some payments made on this account, from time to time, and assurances on the part of Dalton, Inc., by Dalton personally, that they would do their "very utmost to get this account cleared up in a very short time."

In putting in his case the plaintiff called Dalton as a witness under Section 32 of the Evidence Act, and after a few preliminary questions, Dalton admitted that all the bills of his concern, with the plaintiff, "amounting to the records," were paid after they became due. He was then asked whether it was not a fact that some of these bills were paid as much as a year and a half or two years after they became due. An objection was interposed, on the ground that this was not proper cross-examination under section 32, the purpose of that section being to preserve such evidence or testimony as the party calling the witness was not able to produce by his own witnesses. The court sustained the objection. To know of no such limitation upon the provisions of that section. In our opinion, the objection infringed the instructions and it should have been overruled.

At the close of the plaintiff's case, the trial court, hearing the case without a jury, found the issues for the defendant. In this we think the court also erred. Not only does the record show past due items of substantial amount, running for periods averaging over a year in extent, the plaintiff from time to time threatening to take some action and the defendants warding it off as frequently, by assurances of early payment of substantial amounts, which, in our opinion, would alone justify the allowance of interest, Daniels v. Osborn, 75 Ill. 615; Borden & Selleck Co. v. Fraser and Chalmers, 118 Ill. App. 605, but it appears from the record that these interest charges were shown on the statements sent to the defendants from time to time, and at least on several occasions, these interest items were particularly called to the attention of the defendants in letters from the plaintiff, all without any dispute or protest. Such being the record, we are of the opinion the plaintiff made out a good case, and the defendant, Snitzer, Inc., (the plaintiff having abandoned any claim against Snitzer individually) should have been required to proceed with its proof, if it had any.

For the reasons given, the judgment of the Municipal Court is reversed and the cause is remanded to that court for further proceedings not inconsistent with this opinion.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

[illegible] As the claims of the plaintiff's case, the trial court, trying the case without a jury, found the issues for the defendant. In this no point the court also erred, for only once the record show that the items of substantial amount, namely, for periods averaging over a year in arrears, the plaintiff from time to time threatening to take some action and the defendants evading it off as frequently, by assurances of fully payment of substantial amounts, which, in our opinion, would alone justify the allowance of interest. Dunlop v. Gudgeon, 79 Ill. 499; Mueller v. Colvin Co. v. Kirby and Chicago, 132 Ill. 499. 500, but it appears from the record that these interest charges were shown on the electric card in the delivery fire sim to time, and at least on several occasions, those interest items were particularly called to the attention of the defendants in direct from the plaintiff, all without any dispute or protest. And hence the record, on one of the claims the plaintiff made out a good case, and the defendant, mistaken, too., (the plaintiff having abandoned any claim against mutual indirectly) should have been permitted to proceed with its proof, if it had any.

For the reasons given, the judgment of the municipal court in terms and the cause is remanded to that court for further proceedings not inconsistent with this opinion.

REMANDED.

DAILY, P.J. and O'CONNOR, J. concur.

4 6790

148 - 31278

BENJAMIN LEVY, Appellee, v. JOHN LUSSEN, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

Opinion filed April 8, 1927.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $1275.00, recovered against him in the Superior Court of Cook County by the plaintiff.

The original declaration filed by the plaintiff alleged that the defendant was the owner of and had control over a certain three story brick building, at a given address, whereby it became and was his duty to exercise due care in its operation and management, so as to prevent injury to those entering the premises on lawful business; yet the defendant disregarded such duty and while the plaintiff was lawfully upon the premises, the defendant so carelessly, unskillfully and negligently managed and operated the building that by reason thereof the plaintiff, who was in the exercise of due care and caution, was injured. A demurrer interposed to that declaration by the defendant was sustained, and the plaintiff thereupon filed an amended declaration, setting up the same cause of action recited in his original declaration, but with greater particularity.

MARIAN LUTY,

Appellee,

v.

[illegible]

Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

Opinion filed April 8, 1927.

MR. JUSTICE [illegible] delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $1875.00, recovered against him in the superior court of Cook County by the plaintiff.

The original declaration filed by the plaintiff alleged that the defendant was the owner of and had control over a certain three story brick building, at a given address, whereby it became and was his duty to exercise due care in its operation and management, so as to prevent injury to those entering the premises on lawful business; yet the defendant disregarded such duty and while the plaintiff was lawfully upon the premises, the defendant so negligently, wantonly and negligently managed and operated the building that by reason thereof the plaintiff, who was in the exercise of due care and caution, was injured. A demurrer interposed to that declaration by the defendant was sustained, and the plaintiff thereupon filed an amended declaration, setting up the same cause of action contained in the original declaration, but with greater particularity.

A demurrer which the defendant interposed to the amended declaration was overruled, whereupon the defendant pleaded the general issue and a special plea of the statute of limitations. The plaintiff filed a replication to the plea of the general issue and a demurrer to the plea of the Statute of Limitations. The demurrer to the special plea was sustained. The parties went to trial on the issues joined by the plea of the general issue and this resulted in a verdict for the plaintiff, assessing his damages at $1375.00. Judgment being entered on that verdict, the defendant perfected this appeal.

In support of his appeal the defendant contends that the trial court erred in overruling his demurrer to the amended declaration; first, because it failed to state a cause of action; and second, because "it shows on its face that plaintiff's action was barred by the Statute of Limitations." This contention is without merit for several reasons. In the first place, the defendant did not stand by his demurrer, but when it was overruled, he proceeded to plead. That being the case, he may not now be heard to urge that the trial court erred in overruling his demurrer. Moreover, we are of the opinion that the amended declaration did set up a good cause of action, and it was not open to the other point urged by the defendant, as an issue of the Statute of Limitations may not be raised at law by demurrer, but must be interposed by a special plea. In contending the contrary, defendant has called our attention to Northern Trust Co., Admr. v. Chicago Railways Co., 232 Ill. App. 246; Kirkpatrick v. Monroe, 234 Ill. App. 213; and Leach v. Chicago City Railway Co., 182 Ill. 359. The first and last cases cited are not in point. In both of

A demurrer which the defendant interposed to the amended declaration was overruled, whereupon the defendant pleaded the general issue and a special plea of the statute of limitations. The plaintiff filed a replication to the plea of the general issue and a demurrer to the plea of the statute of limitations. The demurrer to the special plea was sustained. The parties went to trial on the issues joined by the plea of the general issue and "did find for the plaintiff, assessing his damages at $1278.00. Judgment being entered on that verdict, the defendant perfected this appeal.

In support of his appeal the defendant contends that the trial court erred in overruling his demurrer to the amended declaration; first, because it failed to state a cause of action; and second, because "it shows on its face that plaintiff's action was barred by the statute of limitations." This contention is without merit for several reasons. In the first place, the defendant did not stand by his demurrer; but when it was overruled, he proceeded to plead. That being the case, he may not now be heard to urge that the trial court erred in overruling his demurrer. Moreover, we are of the opinion that the amended declaration did set up a good cause of action, and it was not open to the other point urged by the defendant, on account of the statute of limitations, as it was not in issue by reason of the failure of limitations to be raised by demurrer, but must be interposed by a special plea. In overruling the contrary, defendant has relied on authority to Kirkpatrick Pulpit Co., Inc., v. Pulsar Delivery Co., 128 Ill. App. 368; Fitzpatrick v. Murray, 224 Ill. App. 211; and Jones v. Chicago City Railway Co., 182 Ill. 388. The first and last cases cited are not in point. In both of

of them the Statute of Limitations was specially pleaded. The Kirkpatrick case is in point but, in our opinion, it is contrary to the established law in this state. Gunton v. Hughes, 181 Ill. 152; Hall v. Chesapeake & Ohio Railroad Co., 200 Ill. 66; Langan v. Drainage District, 239 Ill. 430.

The defendant contends that the trial court erred in sustaining the demurrer of the plaintiff to the plea of the Statute of Limitations. In our opinion, this contention is likewise untenable. It may not reasonably be said that the original declaration failed to state any cause of action. It may have been subject to demurrer on the ground that its allegations were too general and that it failed to set forth the facts with a proper degree of particularity. The amended declaration did not complain of any negligence other than such as the plaintiff had referred to in his original declaration. The amended declaration in no sense set up a new or different cause of action. I.C. R.R. Co. v. Souders, 178 Ill. 585; The General Railroad Co. v. Carroll, 189 Ill. 273; C. & E.I. R. R. Co. v. Wallace, 203 Ill. 129; Hagen v. Schleuter, 236 Ill.467. The court, therefore, properly sustained the plaintiff's demurrer to the special plea of the Statute of Limitations.

The defendant further contends that the plaintiff should not be allowed to recover, inasmuch as he is shown to have been guilty of contributory negligence. From the argument advanced, it would seem that the position of the defendant is that this is so clearly shown by the evidence that it should be held that all reasonable minds would say that the plaintiff was guilty of contributory negligence. In other words, that it should be held that he was guilty of such negligence as a

of them the statute of limitations was specially pleaded. The Kingsnorth case is in point but, in our opinion, it is contrary to the established law in this state. Dunham v. Hunter, 1M1 III. 1[illegible]; Hall v. Commercial & Co. National Bk., 100 Ill. 90; Parker v. Bradshaw Institute, 79 Ill. 49.

The defendant contends that the trial court erred in sustaining the demurrer of the plaintiff to the plea of the statute of limitations. In our opinion, this contention is likewise untenable. It may not reasonably be said that the original declaration failed to state any cause of action. It may have been subject to demurrer on the ground that its allegations were too general and that it failed to set forth the facts with a proper degree of particularity. The amended declaration did not unmistakably say negligence other than was as the plaintiff had referred to in his original declaration. The amended declaration in no sense set up a new or different cause of action. I.C.R.R. Co. v. Frederick, 179 Ill. 288; The Sawyer Spinning Co. v. Carroll, 180 Ill. 279; C. & A.R.R. Co. v. Pulsifer, 208 Ill. 189; Brown v. Schlueter, 208 Ill.487. The court, therefore, properly sustained the plaintiff's demurrer to the special plea of the statute of limitations.

The defendant further contends that the plaintiff should not be allowed to recover, because he is alleged to have been guilty of contributory negligence. From the evidence adduced, it would seem that the position of the defendant is that this is so clearly shown by the evidence that it should be held that all reasonable minds would say that the plaintiff was guilty of contributory negligence. In other words, that it should be held that he was guilty of such negligence as a

matter of law. With this contention we are unable to agree. The evidence shows that the plaintiff was a postman and that he visited the premises in question daily in the performance of his duties, and had done so for some years; that he was required to go up a flight of steps to a porch or platform, where the mail boxes of the tenants were located, to leave their mail; that these steps and the porch had been in bad condition for some time; and that the plaintiff had observed its condition and on one occasion, some weeks before the accident, he called the defendant's attention to the matter and said he thought it ought to be fixed up or someone would get hurt. The evidence is that some of the boards in the floor of the porch were "rotten." In our opinion, the evidence fails to show that the condition of the floor could be seen to be so dangerous, that plaintiff's continued use of it should be held to be such negligence on his part as would defeat his action as a matter of law. The plaintiff was on the defendant's premises by his invitation or authority, Sutton v. Penn, 238 Ill. App. 182. Even though the plaintiff knew of the condition of the steps and porch, the evidence on this question being as above stated, his use of them could not be said to be negligence on his part as a matter of law. City of Mattoon v. Faller, 217 Ill. 273. At most, the question of contributory negligence was one for the jury to pass upon.

For the reasons stated, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P. J. AND O'CONNOR, J. CONCUR.

matter of law. With this construction we are unable to agree. The evidence shows that the plaintiff was a postman and that he visited the premises in question daily in the performance of his duties, and had done so for some years; that he was required to go up a flight of steps to a porch or platform, where the mail boxes of the tenants were located, to leave their mail; that these steps and the porch had been in bad condition for some time; and that the plaintiff had observed its condition and on one occasion, some weeks before the accident, he called the defendant's attention to the matter and said he thought it ought to be fixed up or someone would get hurt. The evidence is that some of the boards in the floor of the porch were "rotten." In our opinion, the evidence fails to show that the condition of the floor could be seen to be so dangerous, that plaintiff's continued use of it should be held to be such negligence on his part as would defeat his action as a matter of law. The plaintiff was on the defendant's premises by his invitation or authority. Sutton v. Penn, 238 Ill. App. 182. Even though the plaintiff knew of the condition of the steps and porch, the evidence on this question being as above stated, his use of them could not be said to be negligence on his part as a matter of law. City of Mattoon v. Fuller, 217 Ill. 271. At most, the question of contributory negligence was one for the jury to pass upon.

For the reasons stated, the judgment of the Appellate Court is affirmed.

JUDGMENT AFFIRMED.

FULTON, P. J., AND O'CONNOR, J. CONCUR.

209 - 31341

JOHN J. HAECHLE, Appellee, v. E. H. HAUCK, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed April 6, 1927.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $600, which was recovered against him in the Municipal Court of Chicago by the plaintiff, in a contract action brought by the latter to recover the amount he claimed was due him as a commission for bringing about the sale of certain lands the defendant owned.

The record shows that the plaintiff was a clerk in a railroad office in the City of Chicago. He answered a newspaper advertisement of the defendant, wherein certain farm lands in the State of Wisconsin were offered for sale. After some talk between the parties, the defendant made a proposition to the plaintiff in writing, reading as follows: "We will give you One Dollar ($1.00) an acre commission on any parties that you refer to us to whom we succeed in selling land to. We will also allow you a rebate of $1.00 an acre on anything you buy yourself." The only claim the plaintiff made which was based on the last sentence in this offer, had to do with an 80 acre

Opinion filed April 5, 1927.

Mr. JUSTICE HOUSTON delivered the opinion of the court.

tract he testified he bought from a third party, who, in turn, had bought it from the defendant. It would seem to be clear that the plaintiff had no valid claim against the defendant as far as that purchase was concerned, and the trial court took that view of it.

As to the plaintiff's claim under the first sentence in the proposition above quoted, it appears that the plaintiff interested a number of his acquaintances, apparently all of them being engaged in the same line of work in which he was, and they formed an association called the Marengo Valley Association, and appointed one Walsh to act for them as trustee, in purchasing some Wisconsin farm property from the defendant. The plaintiff and some nineteen of his friends then entered into a written agreement with the defendant, - confirming the authority of their trustee, Walsh, in a written contract, into which he in turn entered with the defendant, - for the purchase of about 300 acres of land. The land was to be paid for in monthly installments. This first contract was entered into in October, 1919. In June 1920, more people had become interested in this Marengo Valley Association, some through the plaintiff and others having become interested through other parties to the first agreement. The parties to the original contract with those who had later become interested, made a second agreement with the defendant, covering the purchase of a larger acreage. Again, in January 1921, a still larger group, including the plaintiff and those who had entered into the previous contracts with the defendant, and some who had become interested in the project following the

trust be testified to bought from a third party, who, in turn, had bought it from the defendant. It would seem to be clear that the plaintiff had no valid claim against the defendant as far as that produce was concerned, and the trial court took that view of it.

As to the plaintiff's claim under the first contract in the proposition above quoted, it appears that the plaintiff introduced a number of his acquaintances, apparently all of them belonging in the same line of work in which he was, and they formed an association called the Orange Valley Association, and appointed one Walsh to act for them as trustee, in purchasing land situated from property from the defendant. The plaintiff and some members of his friends then entered into a written agreement with the defendant - outlining the authority of their trustee, Walsh, in a written contract, into which he is then entered with the defendant - for the purchase of about 200 acres of land. The land was to be paid for in monthly instalments. This first contract was entered into in October, 1911. In June 1910, more people had become interested in this Orange Valley Association, some through the plaintiff and others having become interested through other parties to the first agreement. The parties to the original contract with those who had later become interested, with a second agreement with the defendant, covering the purchase of a larger acreage. Again, in January 1911, a still larger group, including the plaintiff and those who had entered into the previous contracts with the defendant, and some who had become interested in the project following the

execution of these contracts, made another agreement with the defendant, which again increased the acreage contracted for. Each of these agreements took the place of the one previously made. The last one called for the purchase of 1480 acres. Based on that contract, the plaintiff claimed he was entitled to a commission of $1480.00. The plaintiff's position in the trial court was that this commission came to be due him upon the execution of the contract by the defendant with the proposed purchasers. The evidence shows that the defendant had paid the plaintiff the sum of $400. The issues were submitted to the trial court without a jury, resulting in a finding in the plaintiff's favor and the entering of the judgment appealed from.

Among other things, the defendant alleged in his affidavit of merits that the agreement he had made with the plaintiff was tothe effect that he would pay the latter a commission of one dollar an acre for all land sold by the plaintiff for him, "said commission to be payable when one-fourth of the purchase price of said lands had been paid by the purchasers." The proposition which constituted the agreement between the parties was in writing and when it was introduced in evidence it was shown to contain no such condition as was mentioned by the defendant in his affidavit of merits. The record shows that counsel for the defendant had never seen this written proposal, signed by the defendant, until it was introduced in evidence, and some remarks passed between the court and counsel as to the advisability of amending the pleadings, but no amendment was ever made.

execution of these contracts, made another agreement with the defendant, which again increased the storage contracted for. Each of these agreements took the place of the one previously made. The last one called for the purchase of 1000 cords. Based on that contract, the plaintiff claimed he was entitled to a commission of $1000.00. The plaintiff's position in the trial court was that this commission was due to be due him upon the execution of the contract by the disagreement with the proposed purchasers. The evidence shows that the defendant had paid the plaintiff the sum of $10. The issues were submitted to the trial court without a jury, resulting in a finding in the plaintiff's favor and the entering of the judgment appealed from.

Among other things, the defendant alleges in his affidavit of merits that the agreement he had made with the plaintiff was to the effect that he would pay the latter a commission of one dollar an acre for all land sold by the plaintiff for him. "said commission to be payable when one-fourth of the purchase price of said lands had been paid by the purchasers." The proposition which constituted the agreement between the parties was in writing and when it was introduced in evidence it was shown to contain no such condition as was maintained by the defendant in his affidavit of merits. The record shows that counsel for the defendant had never been late within proceed, signed by the defendant, until it was introduced in evidence, and upon receipt thereof he wrote the court and counsel as to the advisability of amending the pleadings, but no amendment was ever made.

We are unable to tell from the evidence in the record just how much was paid by these purchasers. One Wood testified that there was not to exceed $2,500.00. The third and last agreement entered into between the defendant and Walsh, as trustee for the purchasers, recited that the latter agreed to pay $37,000 for the property which was then being contracted for, of which $15,849.73 was to be paid "at the ensealing and delivery thereof, receipt of which is hereby acknowledged," the balance in monthly installments. On the theory advanced by the defendant in his affidavit of merits it would seem that the plaintiff would be entitled to the commission agreed upon, if the facts, relating to payment, were as indicated by the recitals in the last agreement which the defendant executed with the purchasers. On the other hand, the question of whether the plaintiff now has any claim against the defendant for a balance in the way of commission, the contract between the parties being such as is evidenced by the writing which the defendant signed, might depend very much on just what took place, when the purchase of the property was abandoned, and the plaintiff and his associates, as the purchasers, and the defendant as the seller, made some new arrangement whereby the defendant, from the evidence in this record, apparently waived any further claims against the purchasers, and they in turn conveyed the property back to the defendant by a quit-claim deed. The evidence of what took place at that time is very meager.

On the record before us, we are of the opinion the judgment for the plaintiff should not be permittedto

We are unable to tell from the evidence in the record just how much was paid by these purchasers. One deed testified that there was not to exceed $5,000. The bills and last agreement entered into between the defendant and Wiley, as trustee for the purchasers, recited that the latter agreed to pay $27,000 for the property which was then being contracted for, of which $15,000.00 was to be paid "at the ensuing mandatory thereof, hereof of which is hereby acknowledged." The balance in monthly installments. In the theory advanced by the defendant in his affidavit of merits it would seem that the plaintiff would be entitled to the commission agreed upon, if the facts, relating to payment, were as indicated by the receipts in the last agreement with the defendant executed with the purchasers. On the other hand, the question of whether the plaintiff now has any claim against the defendant for a balance in the way of commission, the contract between the parties being such as is evidenced by the writing with the defendant signed, might depend very much on just what took place, when the purchase of the property was abandoned, and the plaintiff and his associates, as the purchasers, and the defendant as the seller, made some new arrangement whereby the defendant, from the evidence in this record, apparently waived any further claim against the purchasers, and that in turn accepted the property back in the interest in a salvaging deal. The evidence of just how these at that time is very meager.

On the record before us, we are of the opinion the judgment for the plaintiff should not be permitted

stand, but that the case should go back to the trial court for a new trial, where the pleadings may be properly amended and testimony as to all the facts submitted.

The plaintiff was clearly not a broker and although three contracts were involved, the whole transaction was a single deal, and the fact that he did not have a broker's license is quite immaterial. We think we ought to say further, that from the evidence in this record it is not certain what persons involved in the last contract as purchasers, had been brought into the deal or introduced by the plaintiff. Apparently not all of them had been.

On the basis of the written proposition, which apparently was the real contract between the plaintiff and the defendant, consummated when the plaintiff acted under it, the question, whether he became entitled to his commission when the contract of purchase and sale was executed, as his counsel contended in the trial court, might depend on just what took place when the parties later made some new arrangement, whereby the purchasers quit-claimed the property back to the defendant.

For the foregoing reasons the judgment of the Municipal Court is reversed and the cause is remanded to that court for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

crued, but that the case should go back to the trial court for a new trial, where the pleadings may be properly amended and testimony as to all the facts submitted.

The plaintiff was clearly not a bonafide and without there contracts were involved, the whole transaction was a single deal, and the fact that he did not have a broker's license is quite immaterial. We think we ought to say further, that from the evidence in this record it is not certain that persons involved in the last contract as purchasers, had been brought into the deal or introduced by the plaintiff. Apparently not all of them had been.

On the basis of the written propositions, which apparently was the real contract between the plaintiff and the defendant, recognized when the plaintiff noted under it, the question, whether he became entitled to his commission when the contract of purchase and sale was executed, as his counsel contended in the trial court, might depend on just what took place when the parties later met in some new arrangement, whereby the purchaser withdrew his property from the defendant.

For the foregoing reasons the judgment of the Municipal Court is reversed and the cause is remanded to that court for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

SATLER, P.J., AND O'CONNOR, J., CONCUR.

231 - 31363

EDWIN ANDERSON, Appellee, v. W. W. KIMBALL CO., (a corp.) ET AL, ON APPEAL OF LUKE YORE TRANSFER COMPANY, a corp., Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

Opinion filed April 6, 1927.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $300 recovered against it in the Superior Court of Cook County by the plaintiff, who brought this action to recover damages resulting from a collision between his Ford box-roadster, and a large piano moving truck belonging to the defendant.

The only evidence in the record is that of the plaintiff and one corroborating witness. The collision took place at the intersection of 59th street and Robey street in the City of Chicago, about 9 o'clock in the evening on April 25, 1925. There are double street railway tracks in both 59th street and Robey street. The plaintiff was driving his roadster west in 59th street, straddling the left hand rail of the west bound track. The defendant's truck was being driven north in Robey street in the north bound track. The front of the plaintiff's roadster

collided with the side of the piano truck at about the middle of the truck, as the plaintiff put it, or about the rear wheel of the truck, as his corroborating witness put it. The defendant submitted no testimony. The jury found the issues for the plaintiff and assessed his damages at the amount of the judgment appealed from.

The plaintiff's corroborating witness was the motorman of a southbound street car on the Robey street line, which was standing facing south on the north side of Robey street, at the time of this collision. This witness said that the defendant's truck was proceeding north at a speed of about 10 miles an hour, and he gave it as his opinion that the plaintiff was driving at about 20 miles an hour. He described the intersection as being fairly well lighted. There was one electric arc light, located at the northeast corner of the intersection.

The plaintiff estimated the speed of his roadster at 15 miles an hour. He said it was a clear night and had not been raining. He further testified that as he approached the intersection he slowed down and looked both ways, - "mostly to my right" - and that he saw nothing and proceeded, and when he reached the north bound track on Robey street he collided with the defendant's truck. He said he heard no warning and that the lights on the truck were poor. He stated that the truck went about 10 feet after the collision before stopping. On cross-examination he was asked where the truck was when he first saw it, and he answered: "Right in front of me, - * * * half a foot, - * * * just as we hit it."

collided with the side of the plaintiff's truck at about the middle of the truck, as the plaintiff put it, or about the rear wheel of the truck, as his corroborating witness put it. The defendant submitted no testimony. The jury found the issues for the plaintiff and assessed his damages at the amount of the judgment appealed from.

The plaintiff's corroborating witness was the motorman of a southbound street car on the Ridge street line, which was standing facing south on the west side of Ridge street, at the time of this collision. This witness said that the defendant's truck was proceeding north at a speed of about 10 miles an hour, and he gave it as his opinion that the plaintiff was driving at about 30 miles an hour. He described the intersection as being fairly well lighted. There was one electric arc light, located at the northeast corner of the intersection.

The plaintiff estimated the speed of his roadster at 18 miles an hour. He said it was a clear night and had not been raining. He further testified that as he approached the intersection he "looked down the north bound way" - "mostly to my right" - and that he saw nothing and proceeded; and when he reached the north bound track on Ridge street he collided with the defendant's truck. He said he heard no warning and that the lights on the truck were poor. He stated that the truck was about 10 feet after the collision before stopping. In cross-examination he was asked where the truck was when he first saw it, and he answered: "Right in front of me." - " " " half a foot." - " " " Just as we hit it."

Counsel for the defendant announced at the close of the foregoing testimony submitted by the plaintiff, that in view of the plaintiff's evidence he had nothing to offer. The court then instructed the jury to the effect that there was in full force and effect a statute of this state, providing in part, that "when traveling upon any public highway in this State, all vehicles shall grant the right of way to all vehicles approaching intersecting highways from the right and shall have the right of way over those approaching from the left."

The court then instructed the jury that "when a motor vehicle is approaching an intersection from the right, within the meaning of the statute and is entitled to the right of way, its driver had the right to act upon the assumption that all motor vehicles approaching along intersecting highways from the left, willmobey the law and grant the right of way."

The plaintiff's declaration consisted of 7 counts; the first charging general negligence; the second charging wilful and wanton conduct in the management of the truck; the third, excessive speed; the fourth, wilful and wanton conduct as to speed; the fifth, negligence in failing to yield the right of way; the sixth, wilful and wanton negligence in failing to yield the right of way; and seventh, negligence in failing to provide the truck with proper brakes or a proper signal device. The plaintiff submitted no evidence whatever tending to support any of the counts except the first and the fifth.

Counsel for the defendant concluded at the close of the foregoing testimony submitted by the plaintiff, that in view of the plaintiff's evidence he had nothing to offer. The court then instructed the jury to the effect that there was in full force and effect a statute of this state, providing in part, that "when traveling upon any public highway in this State, all vehicles shall yield the right of way to all vehicles approaching intersecting highways from the right and shall have the right of way over those approaching from the left."

The court then instructed the jury that "when a motor vehicle is approaching an intersection from the right, within the meaning of the statute and is entitled to the right of way, its driver had the right to act upon the assumption that all motor vehicles approaching along intersecting highways from the left, although the law said that the right of way."

The plaintiff's declaration consisted of 7 counts; the first charging general negligence; the second charging willful and wanton conduct in the management of the truck; the third, excessive speed; the fourth, willful and wanton conduct on to speed; the fifth, negligence in failing to yield the right of way; the sixth, willful and wanton negligence in failing to yield the right of way and seventh, negligence in failing to provide the truck with proper brakes or a proper signal device. The plaintiff submitted no evidence tending to support any of the counts except the first and the fifth.

By the court's instructions, the jury were told, in effect, that under the provisions of the statutes of this state, (Cahill's Illinois Statutes, chapter 95a, par. 34) all vehicles approaching intersecting highways from the right are entitled to the right of way over those approaching from the left; and that when such a vehicle is approaching an intersection from the right, "within the meaning of the statute," its driver "had" the right to assume that vehicles approaching from the left would obey the law and grant the right of way. These instructions amounted in substance to a peremptory instruction to find the issues for the plaintiff. Counsel for the plaintiff, in support of these instructions, relied upon Partridge v. Erbstein, 225 Ill. App. 209 and McCarthy v. Fagen, 236 Ill. App. 300. Counsel for the defendant also cites the Partridge case. We have recently had occasion to consider this question of the law of the road, as applied to vehicles at intersections under the provisions of the statute, and have stated that we are unable to agree with those cases. Heidler Hardwood Lumber Co. v. Wilson-Bennett Mfg. Co., 243 Ill. App. 89. We there said that the statute in question "does not mean that the driver of a vehicle approaching an intersection, must yield the right of way to one approaching the same intersection on his right, without regard to the distance that vehicle may be from the intersection when he reaches it or to the rates of speed at which the two vehicles are traveling. When the driver of a vehicle approaches an intersection and he sees another vehicle approaching from the right, at a greater distance from the intersection and at a rate of speed such that, in the exercise of due care, he believes

By the court's instructions, the jury were told, in effect, that under the provisions of the statutes of this state, (Smith's Illinois Statutes, chapter 95½, par. 54) all vehicles approaching intersecting highways from the right are entitled to the right of way over those approaching from the left; and that when such a vehicle is approaching an intersection from the right, "within the meaning of the statute," the driver "had" the right to assume that vehicles approaching from the left would obey the law and grant the right of way. These instructions amounted in substance to a peremptory instruction to find the issues for the plaintiff. Counsel for the plaintiff, in support of these instructions, relied upon Martinez v. Interstate, 288 Ill. App. 309 and Mohrman v. Kaiser, 298 Ill. App. 500. Counsel for the defendant also cite the Martinez case. We have recently had occasion to consider this question of the law of the road, as applied to vehicles at intersections under the provisions of the statute, and have stated that we are unable to agree with those cases. Holder v. Hummel Lumber Co. v. Kilgo-Dennis Ptr. Co., 345 Ill. App. 59. We there said that the statute in question "does not mean that the driver of a vehicle approaching an intersection must yield the right of way to one approaching the same intersection on his right, without regard to the distance that vehicle may be from the intersection when he reaches it or to the rapidity with which the two vehicles are traveling. When the driver of a vehicle approaches an intersection and he sees another vehicle approaching from the right, at a greater distance from the intersection and at a rate of speed such that, in the exercise of due care, he believes

he will be across the intersection before the vehicle approaching from the right reaches it, then, in our opinion, the latter car is not one 'approaching from the right' within the meaning of the statute, and so as to require such driver to stop or yield the right of way. Whether, in exercising his judgment and going ahead, the driver exercised due care, is ordinarily a question for the jury to decide." We held that such was the situation in that case, where the evidence showed that the collision occurred when the car approaching from the left had reached the area beyond the middle of the intersection, and the one approaching from the right had not reached the middle of the intersection; and where the car coming in from the left was struck in the rear by the front part of the car coming in from the right.

In the Heidler Lumber Company case we reviewed all the recent cases in this State on this subject, and a number in other states. The instructions submitted to the jury by the trial court in the case at bar were contrary to what we believe the law is on this subject, as we have stated it in the case referred to.

In the case at bar, as in the Heidler case, we believe that it may not be said, as a matter of law, that the statute applied and that the driver coming to the intersection from the left proceeded across at his peril. We are further of the opinion, that the evidence in the case at bar submitted in behalf of the plaintiff, presents a different situation of fact than the one which was pre-

he will be across the intersection before the vehicle approaching from the right reaches it, then, in our opinion, the latter car is not one 'approaching from the right' within the meaning of the statute, and so as to compel such driver to stop or yield the right of way. Whether, in exercising his judgment and using sound, the driver exercised due care, is primarily a question for the jury to decide." He held that such was the situation in that case, where the evidence showed that the collision occurred when the car approaching from the left had reached the area beyond the middle of the intersection, and the one approaching from the right had not reached the middle of the intersection; and where the car coming in from the left was within in the near by the front part of the car coming in from the right.

In the Pullman Limber Company case we reviewed all the recent cases in this State on this subject, and a number in other states. The instructions criticized in the jury by the trial court in the case at bar were identical to what we believe the law is on this subject, as we have stated it in the case referred to.

In the case at bar, as in the Pullman case, we believe that it may not be said, as a matter of law, that the statute applied and that the driver coming in the intersection from the left proceeded across at his peril. In our further of the opinion that the evidence in the record was sufficient to submit to the jury, Franklin's different situation of that from the Pullman case.

sented in the Heidler Lumber case. There we were of the opinion that under the evidence submitted, the issue involved was one for the jury to determine; whereas in the case at bar we believe the trial court should have treated the question of contributory negligence as one of law. That question was presented to the court when the defendant submitted his motion for a directed verdict at the close of the plaintiff's case, and we are of the opinion that the trial court erred in denying that motion. On the plaintiff's own evidence, the respective speeds of these vehicles were such that in order for them to collide as they did and at the point in the intersection where the collision is shown to have taken place, although the collision occurred at night and the defendant's truck might have been better lighted, the evidence shows that there was an arc light at the near side of the intersection at the plaintiff's right, and if he had observed the situation presented when he approached this intersection, even in a casual way, he would have seen the large truck passing over the intersection in front of him; but he says himself that he didn't even see the truck until he was within six inches of it. It is further clear from the plaintiff's evidence that the defendant must have been well into the intersection before the plaintiff reached it.

The trial court, in our opinion, should have held as a matter of law that the statute did not apply to the situation presented and that the plaintiff was guilty of contributory negligence.

The judgment of the Superior Court is, therefore, reversed with a finding of fact.

JUDGMENT REVERSED WITH A FINDING OF FACT.

FINDING OF FACT:

We find as a fact that the plaintiff was guilty of contributory negligence.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

sented in the Middle Judicial Court. There we were of the opinion that under the evidence submitted, the issue involved was one for the jury to determine whether in the case at bar we believe the trial court was in error when it granted the question of contributory negligence. That question was presented to the court when the defendant submitted his motion for a directed verdict at the close of the plaintiff's case, and we are of the opinion that the trial court erred in denying that motion. On the plaintiff's own evidence, the respective speeds of those vehicles were such that in order for them to collide as they did and at the point in the intersection where the collision is shown to have taken place, although the collision resulted in light and the defendant's truck might have been better lighted, the evidence was that there was an arc light at the near side of the intersection at the plaintiff's right, and if he had observed the situation presented when he approached this intersection, even in a casual way, he would have seen the large truck passing over the intersection in front of him but he says himself that he didn't even see the truck until he was within six inches of it. It is further clear from the plaintiff's evidence that the defendant must have been well into the intersection before the plaintiff reached it.

The trial court, in our opinion, should have held as a matter of law that the statute did not apply to the situation presented and that the plaintiff was guilty of contributory negligence.

The judgment of the Superior Court is, therefore, reversed with a finding of fact.

TRUEMAN ATWOOD VS. WITH A FINDING OF FACT.

FINDING OF FACT:

We find as a fact that the plaintiff was guilty of contributory negligence.

FILED, E.J. AND O'CONNOR, J. DISSENT.

266 - 31398

JAMES J. LOUGHLIN, Appellee, vs. ALBERT L. MULKEY and ALICE L. MULKEY, Appellants.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Complainant filed a creditor's bill and upon hearing by the Chancellor had a decree ordering certain shares of stock of the Alice Apartment Building Corporation to be sold to satisfy two judgments held by complainant against Albert L. Mulkey, one for $390.18 and the other for $454 and costs; also finding that a certain judgment held by Mulkey as assignee against Loughlin for $978.31 was null and void. Defendants appeal, presenting twenty-one points for reversal.

It is first asserted that no replications have been filed and therefore the answers of Albert and Alice Mulkey must be taken as true. The decree recites replications, and as we have before us only a praecipe record we must assume the correctness of the recitals of the decree in this respect.

It is said that the Chancellor struck out the evidence touching the validity of the judgments held by complainant against Mulkey on the ground that they could not be attacked collaterally, but inconsistently permitted complainant to attack the validity of the counter-judgment held by Mulkey as assignee of the Union Bank of Chicago against Loughlin. The record explains this. Complainant's bill asserted the two judgments against Mulkey. Mulkey filed an amended answer, alleging that the notes upon which these judgments were obtained were accommodation notes executed at

the request and for the benefit of Loughlin, for which he, Mulkey, never received anything of value. Mulkey also filed his cross-bill in which he again asserted the invalidity of the notes upon which Loughlin held judgments, and further alleged the rendition of a judgment in favor of the Union Bank of Chicago against Loughlin for $978.31, which had been duly assigned to him and upon which execution had been issued and returned unsatisfied. Complainant answered, denying the allegations of Mulkey's cross-bill. The pleadings thus submitted for the consideration of the Chancellor the validity of all three of the judgments.

Upon the hearing complainant gave testimony in detail concerning the execution and delivery of the notes by Mulkey, resulting in the judgments upon which the creditors' bill was predicated. This evidence tended to establish their validity and to negative the allegations of the defendants in this respect. Thereupon counsel for the defendants moved to strike out all of complainant's testimony except the documentary evidence showing the two judgments, execution and return. The court indicated that this would be done with the understanding that if the defendants introduced evidence attacking these judgments, complainant's testimony would stand and he would be given an opportunity to reply in rebuttal. Defendants then introduced only the record of the judgment obtained by the Union Bank against Loughlin and assigned to Mulkey, and rested. Thereupon evidence was introduced in behalf of complainant, as cross-defendant, attacking the validity of Mulkey's judgment; defendant's objection to this was over-ruled and he then introduced evidence to sustain his judgment.

The seeming inconsistency in the court's rulings was brought about by the defendant obtaining an improper ruling on his motion to exclude all of the evidence of the complainant touching his judgments. In making this ruling the Chancellor indicated he would permit the defendant to introduce evidence to meet complainant's

the request and for the benefit of Longbilla, for which he, Hulley, never received anything of value. Hulley also filed his cross-bill in which he again asserted the invalidity of the notes upon which Longbilla held judgments, and further alleged the rendition of a judgment in favor of the Union Bank of Chicago against Longbilla for $978.00, which had been duly assigned to him and upon which execution had been issued and returned unsatisfied. Complainant answered, denying the allegations of Hulley's cross-bill. The pleadings then submitted for the consideration of the Chancellor the validity of all three of the judgments.

Upon the hearing complainant gave testimony to detail concerning the execution and delivery of the notes by Hulley, resulting in the judgments upon which the creditors' bill was predicated. This evidence tended to establish their validity and to negative the allegations of the defendants in this respect. Thereupon counsel for the defendants moved to strike out all of complainant's testimony except the documentary evidence showing the two judgments, execution and return. The court indicated that this would be done with the understanding that if the defendants introduced evidence attacking these judgments, complainant's testimony would stand and he would be given an opportunity to reply in rebuttal. Defendants then introduced only the record of the judgment obtained by the Union Bank against Longbilla and assigned to Hulley, and rested. Thereupon evidence was introduced in behalf of complainant, an cross-defendant, attacking the validity of Hulley's judgment; defendant's objection to this was overruled and he then introduced evidence to sustain his judgment.

The decisive determinatory in the court's ruling was result arrived by the defendant obtaining an improper ruling on his motion to exclude all of the evidence of the complainant touching his judgments. In making this ruling the Chancellor indicated he would permit the defendant to introduce evidence to meet complainant's

testimony, but the defendant chose to rest on the ruling of the court and introduced no evidence questioning the validity of the judgments against him. All the judgments having been submitted to the Chancellor to make an equitable adjustment thereof, the defendants should not have asked the court to exclude the evidence offered by complainant touching the same. Having obtained an erroneous ruling in this respect, defendants cannot complain that the court permitted evidence touching the judgment against Loughlin assigned to Mulkey.

Defendants assert that all the evidence attacking the judgments was in the nature of a collateral attack and should have been disregarded by the court. We have examined the cases cited to support this, but none of them is applicable to the instant situation. It is the general rule that where a court of equity has jurisdiction of the parties and the subject matter of the litigation, it has authority for the purpose of administering equitable relief to adjudicate all the rights of the parties which are involved in the litigation. Old Colony Life Insurance Co. v. Graves, 200 Ill. App. 71; Roman v. Humphreys, 220 Ill. App. 502, and cases there cited. It is well established that a court of equity has jurisdiction to set aside a judgment at law upon proper showing. Hubbard v. National Stamping & Electric Works, 213 Ill. App. 235; Harding v. Hawkins, 141 Ill. 572; Friedberg v. DePew, 200 Ill. App. 397; Simpson v. Simpson, 273 Ill. 90.

There is much argument as to the finding of the court that the judgment obtained by the Union Bank of Chicago against Loughlin and assigned to Mulkey was void. The transactions between Mulkey and Loughlin giving rise to the note upon which the judgment was entered are involved, and it would serve no purpose to relate them here. It is sufficient to say that the evidence justified the finding that Mulkey obtained said note from Loughlin by fraud and circumvention and without any consideration, and therefore the

testimony, but the defendant chose to rest on the ruling of the court and introduced no evidence questioning the validity of the judgments against him. All the judgments having been submitted to the Commissioner to make an equitable adjustment thereof, the defendants should not have asked the court to examine the evidence offered by complainant touching the same. During extended and erroneous ruling in this respect, defendants cannot complain that the court admitted evidence touching the judgment against Longmile assigned to Bailey.

Defendants assert that all the evidence attaching the judgments was in the nature of a collateral attack and should have been disregarded by the court. We have examined the cases cited to support this, but none of them is applicable to the instant situation. It is the general rule that where a court of equity has jurisdiction of the parties and the subject matter of the litigation, it has authority for the purpose of administering equitable relief to adjudicate all the rights of the parties which are involved in the litigation. <u>Old Colony Life Insurance Co. v. Brown</u>, 2nd Ill. App. 71; <u>Dunn v. Sunderland</u>, 5th Ill. App. 97, and cases there cited. It is well established that a court of equity has jurisdiction to set aside a judgment at law upon proper showing. <u>Mitchell v. National Bronzing & Electric Works</u>, 242 Ill. App. 258; <u>Lewing v. Perkins</u>, 141 Ill. 272; <u>Pritchkunas v. Dalton</u>, 300 Ill. App. 407; <u>Stanton v. Stanton</u>, 275 Ill. 99.

There is much argument as to the finding of the court that the judgment obtained by the Union Bank of Chicago against Longmile and assigned to Bailey was void. The transactions between Bailey and Longmile giving rise to the note upon which the judgment in question arose are involved, and it would serve no purpose to relate them here. It is sufficient to say that the evidence justified the finding that Bailey obtained said note from Longmile by fraud and misrepresentation and without any consideration, and therefore the

Substituted Page

judgment on the same, assigned to him, was null and void.

The decree properly found that at the time of the service of summons Albert Mulkey was the owner of 248 shares of stock of the Alice Apartment Building Corporation and that after the service of summons he transferred said shares to Alice L. Mulkey for the purpose of hindering and delaying his creditor, the complainant, who was entitled to have the same sold to satisfy the said judgment with interest and costs. The filing of the creditors' bill created a lien on this stock and the transfer to Alice Mulkey was subject to this lien. King v. Goodwin, 130 Ill. 102.

There was no abuse of discretion on the part of the Chancellor in denying Mulkey's motion to continue the cause.

It would unduly extend this opinion to attempt to notice adequately all the points made by the defendants in their brief. We have considered them, but are of the opinion that the decree does substantial justice between the parties and that no paramount reason for reversal appears. The decree was in pursuance of the issues presented by the pleadings, and it is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

judgment on the case, required to him, was null and void.

The Supreme Property found that at the time of the execution of mortgage Albert Bailey was the owner of 388 shares of stock of the Allen Apartment Building Corporation and that after the execution of mortgage he transferred said shares to Allen I. Bailey for the purpose of misleading and delaying his creditor, the complainant, who was entitled to have the same sold to satisfy the said judgment with interest and costs. The filing of the creditors' bill created a lien on this stock and the transfer to Allen Bailey was subject to this lien. Kane v. Gooding, 180 Ill. 108.

There was no abuse of discretion on the part of the chancellor in denying defendant's motion to continue the cause.

It would unduly extend this opinion to attempt to notice adequately all the points made by the defendants in their brief. We have considered them, but are of the opinion that the record does substantial justice between the parties and that no judgment reason for reversal appears. The decree was in harmony of the issues presented by the pleadings, and it is affirmed.

AFFIRMED.

Mechanics and Farmers, 17., remanded.

judgment on the same, assigned to him, was null and void.

The decree properly found that at the time of the service of summons Albert Mulkey was the owner of 248 shares of stock of the Alice Apartment Building Corporation and that after the service of summons he transferred said shares to Alice L. Mulkey for the purpose of hindering and delaying his creditor, the complainant, who was entitled to have the same sold to satisfy the said judgment with interst and costs. The filing of the creditors' bill created a lien on this stock and the transfer to Alice Mulkey was subject to this lien. King v. Goodwin, 130 Ill. 102.

There was no abuse of discretion on the part of the Chancellor in denying Mulkey's motion to continue the cause. The parties whose testimony he wished to take were in Chicago, and it was not explained why he did not subpoena them in proper time.

It would unduly extend this opinion to attempt to notice adequately all the points made by the defendants in their brief. We have considered them, but are of the opinion that the decree does substantial justice between the parties and that no paramount reason for reversal appears. The decree was in pursuance of the issues presented by the pleadings, and it is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

337 - 31469

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, Appellant, vs. ROBERTS AND SCHAEFER COMPANY, a Corporation, Appellee.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

Plaintiff filed its declaration in trespass on the case, alleging that through the negligence of the defendant it had been damaged in the sum of $35,000. Defendant filed a general demurrer, which was sustained by the trial court, and plaintiff electing to stand by its declaration, judgment against it was entered, from which it appeals.

The declaration alleged that defendant company was a corporation engaged in the business of structural engineers and contractors, with offices at Chicago, Illinois, and that as such, prior to February 7, 1924, it constructed, equipped and completed a dry sand hopper for the plaintiff at Conemaugh, Pennsylvania, for use in sanding its locomotives, and requested the plaintiff to sand its locomotives with said sanding plant before said construction had been accepted by the plaintiff; that in sanding locomotives at said plant a spout attached to the plant is lowered to position over a locomotive sand dome and thereupon a rope is pulled which opens the dry sand valve gate and dry sand pours into the sand dome from above by gravity; that when the engine is sufficiently sanded said rope is released and a weight designated as a counterweight attached to a counterweight arm closes the valve gate and shuts off the flow of sand to the locomotive dome below; that the counterweight is essential to and a necessary part of the mechanism in discharging dry sand into locomotive domes and in shutting off the flow of sand when

the dome is filled; that the counterweight is attached to a counterweight arm, weighs 32 pounds and is suspended 24 feet above the ground level; that the counterweight rises and falls, tilting up and down with said counterweight arm when the sanding plant is in operation; that the counterweight by reason of its weight and height above the ground is a dangerous fixture; that ordinary care for the safety of persons rightfully on the ground below tharged the Roberts and Schaefer Company with a duty to securely attach the same to said arm so that when tilted downward the counterweight would not slip down and off of the end of said arm and fall upon any person or persons who might be rightfully passing along underneath; that said company did not regard its duty in that behalf, but so carelessly and negligently and insecurely attached said counterweight to said counterweight arm that said weight slipped down and off of the end of said arm and struck James Petrarca, who was then and there a locomotive fireman in the employ of plaintiff, while in the exercise of ordinary care and caution, and who was rightfully passing along underneath said counterweight, on February 7, 1924, and inflicted a depressed fracture of his skull which extended into the skull vault and covered the frontal area; that the said Petrarca was seriously injured, and has remained incapacitated to the present time; that said Petrarca instituted a suit against The Pennsylvania Railroad Company to recover damages for the injuries so inflicted upon him; that The Pennsylvania Railroad Company requested the Roberts and Schaefer Company to assume the defense of said suit but it refused to do so, whereupon The Pennsylvania Railroad Company settled with Petrarca for the damage inflicted upon him and sued the Roberts and Schaefer Company to recover the damage which it had suffered in the premises.

The declaration contained six counts, setting up the foregoing facts in different forms.

While it is the universal rule that the pleading of a

the dame is filled; that the counterweight is attached to a counterweight arm, which is pivoted and is inserted in less space than usual level; that the counterweight rises and falls, hitting up and down with said counterweight arm when the counting plant is in operation; that the counterweight by reason of its weight and height above the ground is a dangerous fixture; that ordinary care for the safety of persons lawfully on the premed prior charged the Roberts and Ballmer Company with a duty to exercise ordinary care to said arm so that when lifted downward the counterweight would not slip down and off of the end of said arm and fall upon any person or persons who might be rightfully passing along underneath; that said company did not regard its duty in that behalf, but so carelessly and negligently and incorrectly attached said counterweight to said counterweight arm that said weight slipped down and off of the end of said arm and struck James Patterson, who was then and there a innocent person in the water at Wheeling, which is the exclusive of ordinary care and caution, and who was rightfully passing along underneath said counterweight, on February 7, 1924, and inflicted a deformed fracture of his right wrist, crushed into the right wrist and severed the frontal nerve; that he said injuries are painfully injured, and has remained incapacitated to the present time; that said Patterson instituted a suit against the Pennsylvania Railroad Company to recover damages for the injuries so inflicted upon him; that The Pennsylvania Railroad Company requested the Roberts and Ballmer Company to assume the defense of said suit but it refused to do so, whereupon The Pennsylvania Railroad Company settled with Patterson for the damage inflicted upon him and sued the Roberts and Ballmer Company to recover the damage which it had suffered in the premises.

The indictment contained six counts, embracing the foregoing facts in different form.

While it is the universal rule that the plaintiff of a

party is to be construed most strongly against him, this rule is applicable only where the allegations are ambiguous, equivocal, contradictory or repugnant. It does not mean that the allegations must be hypercritically construed or that distorted or unusual meanings are to be given to language which is unambiguous, the meaning of which would be readily understood by any reasonably intelligent person reading the same.

Defendant asserts that the declaration does not state that there was a contract between plaintiff and defendant, but merely alleges that defendant did some of the work or furnished the material for the construction of the sand hopper; that this is entirely consistent with the hypothesis that it was done under the supervision and control of the plaintiff or according to specifications supplied by the plaintiff, under which circumstances the defendant would not be responsible. This argument ignores the plain averments of the declaration that defendant constructed, equipped and completed the sand hopper in question and requested the plaintiff to sand its locomotives at this plant before the plaintiff had accepted the same. The allegation that the plant was to be tested by the plaintiff before it accepted the same, is inconsistent with the hypothesis that the work was done under the supervision and control of plaintiff or according to specifications furnished by it. It is a reasonable presumption that testing the plant before plaintiff accepted it was to demonstrate its sufficiency in operation as constructed and equipped by defendant, which test would not be necessary if plaintiff was responsible in any way for its construction.

It is next said that the declaration states that the plant was to be constructed at Conemaugh, Pennsylvania, but fails to state where Conemaugh is located with reference to the right of way or the property of the plaintiff. It is immaterial whether or not the sander was constructed on the plaintiff's right of way.

party is to be construed most strongly against him; this rule is applicable only where the allegations are ambiguous, equivocal, contradictory or repugnant. It does not mean that the allegations must be hypertechnically construed or that distorted or unusual meanings are to be given to language which is unambiguous, the meaning of which would be readily understood by any reasonably intelligent person reading the same.

Defendant asserts that the declaration does not state that there was a contract between plaintiff and defendant, but merely alleges that defendant did some of the work or furnished the material for the construction of the road hoping that this is sufficiently consistent with the hypothesis that it was under the supervision and control of the plaintiff or according to specifications supplied by the plaintiff, under which circumstances the defendant would not be responsible. This argument ignores the plain language of the declaration that defendant commenced, equipped and completed the road hoping or in question and requested the plaintiff to examine its improvements as this plant before the plaintiff had accepted the work. The allegation that the plant was to be tested by the plaintiff before it accepted the same, is inconsistent with the hypothesis that the work was done under the supervision and control of plaintiff or according to specifications furnished by it. It is a reasonable presumption that testing the plant before plaintiff accepted it was to demonstrate its utility or any in operation as constructed and equipped by defendant, which test would not be necessary if plaintiff was responsible in any way for its construction.

It is next said that the declaration states that the plant was to be constructed at Commonwealth, Pennsylvania, but fails to state where Commonwealth is located with reference to the right of way or the property of the plaintiff. It is immaterial whether or not the matter was constructed on the plaintiff's right of way.

The declaration alleges it was constructed at Conemaugh, Pennsylvania, for the plaintiff. We do not see how the exact location of the plant is material.

It is also urged that there is no allegation that the insufficient fastening of the counterweight to the counterweight arm was not within the knowledge of the plaintiff, and that there are no facts stated which negative the conclusion that plaintiff and defendant were in pari delicto. We hold to the contrary. The various counts of the declaration aver that the counterweight was twenty-four feet above the ground, attached to an arm extending outward from the sander, and in operation the counterweight rose and fell with the counterweight arm, and that having completed the work the defendant requested the plaintiff to use the plant for the purpose of testing its operation, and that while complying with this request, plaintiff's employee, Petrarca, was passing along said plant when the counterweight slipped down and off the counterweight arm and struck him; that the counterweight was not securely attached to said arm and that by reason thereof it slipped from the arm, striking Petrarca; that ordinary care for the safety of those on the ground level below the sander made it obligatory upon the defendant to securely attach said counterweight to said arm so that when said arm was tilted downward the counterweight would not slip down and off said arm and fall upon any person or persons below, and that defendant did not regard its duty in this behalf but on the contrary carelessly, negligently and insecurely attached the counterweight to the counterweight arm so that it slipped down and off and struck Petrarca.

It is also said that the allegation that Petrarca was at the time engaged in interstate commerce is a legal conclusion. Usually, whether or not parties are engaged in interstate commerce is a question of fact, and it is sufficient to allege this as it was alleged in the declaration.

The last criticism of the declaration is that there are no facts alleged therein showing that Petrarca had a cause of action against the plaintiff and no allegations of facts justifying the assumption of liability on the part of the plaintiff or any allegation that the payment to Petrarca was a reasonable amount. The law charged the plaintiff with the duty to furnish its employees a safe place in which to work. Under the facts averred in the declaration Petrarca was not furnished a safe place in which to work and therefore his employer, the plaintiff, was liable for damages which he sustained in the premises.

The fact that plaintiff might have paid Petrarca more than a reasonable amount in settlement of his claim does not make the declaration open to demurrer. The reasonableness of the amount is subject to proof and plaintiff must establish by evidence the amount of damages it has sustained.

It has been held that one independent contractor may recover for the negligence of another independent contractor, in Pennsylvania Steel Co. v. Elmore & Hamilton Contracting Co., 175 Fed. Rep. 176. It would follow that plaintiff could recover damages which it has been compelled to pay to an employee because of the negligence of a third party. Defendant's counsel seem to concede this principle in their brief by saying: "where a person has been compelled to pay damages on account of the negligence of a third party, the person so paying damages, when he is without fault or negligence on his part and the injury is solely the result of the negligence of the third party, may recover such damages from the third party." Plaintiff by its declaration attempted to state a case under this principle, and we are of the opinion that the declaration contains all the allegations necessary to make such a case, and the demurrer should have been over-ruled.

[illegible] was that our finding of the declaration is that there are no facts alleged therein showing that Petersen had a cause of action against the plaintiff and no allegations of facts justifying the assumption of liability on the part of the plaintiff or any allegation that the payment to Petersen was a reasonable measure.

The law imposed the plaintiff with the duty to furnish his employee a safe place in which to work. Under the facts averred in the declaration Petersen was not furnished a safe place in which to work and therefore his employer, the plaintiff, was liable for damages which he sustained in the premises.

The fact that plaintiff might have paid Petersen more than a reasonable amount in settlement of his claim does not make the declaration open to demurrer. The reasonableness of the amount is subject to proof and plaintiff must establish by evidence the amount of damages it has sustained.

It has been held that one indemnitee contractor may recover for the negligence of his other independent contractor, in [illegible] v. [illegible] Construction Co., 172 Ind. Nep. 172. It would follow that plaintiff could recover damages which it has been compelled to pay to an employee because of the negligence of a third party. Detrehmet's counsel seem to concede this principle in their brief by saying: "where a person has been compelled to pay damages on account of the negligence of a third party, the person so paying damages, upon his without fault or negligence on his part and the injury is solely the result of the negligence of the third party, may recover such damages from the third party." Plaintiff by its declaration attempts to state a case under this principle, and we are of the opinion that the declaration contains all the allegations necessary to make such a case, and the demurrer should have been over-ruled.

For the reasons above indicated, the judgment of the Circuit court is reversed and the cause remanded for further proceedings in accordance with what we have said in this opinion.

REVERSED AND REMANDED.

Matchett, J., Dissents.
Johnston, J., Concurs.

378 - 31510

BRUCE GODSMAN, Appellee, vs. LUDWIG SCHINDLER, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit, claiming a commission on the sale of a theater building belonging to defendant and upon trial had a verdict for $2500, upon which judgment was entered and from which defendant appeals.

By his statement of claim plaintiff asserted that he endeavored to secure a purchaser for defendant's theater; that defendant specifically promised to pay plaintiff $2500 if a prospective purchaser secured by plaintiff would purchase the theater; and that on April 10, 1924, the theater was sold to said purchaser. Defendant's affidavit of defense denied the employment of plaintiff or that he expended any time or efforts in endeavoring to secure a purchaser; denied that defendant at any time promised to pay plaintiff any sum of money; and denied that any purchaser at any time secured by plaintiff purchased defendant's theater.

There was a direct conflict in the testimony of the parties. Plaintiff testified in considerable detail as to alleged conversations and promises by defendant concerning the proposed sale of the theater to a Mr. Hirschberg; that he worked with Hirschberg almost a year at various times after the defendant told him to go ahead and get a purchaser. Hirschberg was dead at the time of the trial so that the statements of plaintiff in this respect are neither supported nor contradicted. This story is vulnerable in spots and not entirely convincing. Defendant

categorically denied that he ever made any promises to plaintiff, who was employed in defendant's theater, and testified that nothing was said as to any claim for commissions until after the theater was sold; that he had known Hirschberg for about eight years and had had a number of conversations with him commencing in 1920, touching the sale of the theater. The evidence produced a close question on the facts.

Whether or not a broker is the procuring cause of a sale is, ordinarily, a question of fact to be determined by the jury, but in order that this may be determined fairly all the competent and relevant evidence touching this fact must be considered. The trial court refused to allow defendant to prove the subject matter of various negotiations between him and Hirschberg, and did not permit Mrs. Lowy, an employee of defendant, to testify as to conversations she had with Hirschberg, all of which would have tended to support defendant's assertion that he himself was the sole procuring cause and not plaintiff. The court seemed to be of the opinion that such conversations, being out of the hearing of plaintiff, were inadmissible.

The exclusion of this testimony was reversible error. The only way the defendant could present his defense was to show such negotiations. Defendant's and Mrs. Lowy's testimony in this respect was clearly relevant to the issue involved and should have been admitted. Amongthe cases supporting our view are Forte v. Cohen, 199 Ill. App. 462; Loving v. Kane, 180 Ill. App. 614; Smith v. Lyons Salt Co., (Mo. App.) 177 S. W. 1057; Keith v. Peart (Wash.) 197 Pac. 928; Obets v. Maney, (Tex.) 146 S. W. 351; Luhn v. Fordtran (Tex.)115 S. W. 667; Brumfield v. Pottier & Stymus Mfg. Co., 23 N. Y. S. 1025; Smiley v. Bradley, (Colo. App.) 70 Pac. 696; White v. Sellmyer, 187 Ill. App. 435.

For the reasons above indicated, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett and Johnston, JJ., concur.

[illegible]ntarily denied that he ever made any promises to plaintiff, [illegible] he was employed in defendant's theater, and testified that neither [illegible]g was held as to any claim for commissions until after the theater [illegible]as sold; that he had known Hirschberg for about eight years and [illegible]had a number of conversations with him commencing in 1920, [illegible]ending the sale of the theater. The evidence produced a close [illegible]question on the facts.

Whether or not a broker is the procuring cause of a [illegible]sale is, ordinarily, a question of fact to be determined by the [illegible]ury, but in order that this may be determined fairly all the [illegible]important and relevant evidence touching this fact must be con[illegible]sidered. The trial court refused to allow defendant to prove the [illegible]subject matter of various negotiations between him and Hirschberg, [illegible]all not permit Mrs. Levy, an employee of defendant, to testify [illegible]to conversations she had with Hirschberg, all of which would have [illegible]tended to support defendant's assertion that he himself was the sole [illegible]procuring cause and not plaintiff. The court seemed to be of the [illegible]opinion that such conversations, being out of the hearing of plain[illegible]tiff, were inadmissible.

The exclusion of this testimony was reversible error. [illegible]Not only was the defendant denied present his defense was to show [illegible]an ungentlemanly, defendant's and Mrs. Levy's testimony in this [illegible]respect was clearly relevant to the issue involved and should have [illegible]been admitted. Among the cases supporting our view are Davis v. [illegible]Jones, 141 Ill. App. 469; Levine v. Klein, 190 Ill. App. 614; Smith [illegible]v. Tenney Bldg. Co., [No. App.] 177 N. E. 1027; Keith v. Hart (Wash.) [illegible]7 Pac. 344; Glass v. Ehrlich, (Tex.) 144 S. W. 811; Lane v. Fritton [illegible]Co., 112 S. W. 417; Kronenberg v. Pottker & Young Bldg. Co., 25 [illegible]T. E. Irwin; Quiles v. Ingraham, (Colo. App.) 70 Pac. 680; Smith [illegible]v. Williams, 187 Ill. App. 638.

For the reasons above indicated, the judgment is reversed and [illegible]the cause remanded.

[illegible]Reversed and remanded.

[illegible]Scott and Johnston, JJ., concur.

410 - 31542

P. L. EMERSON and MRS. P. L. EMERSON, Appellees, vs. UNITED AUTO WRECKERS, Inc., and WILLIAM RANDALL, Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McGURREY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment against them for $2,000 entered upon the trial by the court of an action of trover. Only two points are presented for reversal: (1) misjoinder of the plaintiffs; and (2) the amount of the judgment is excessive.

The subject matter of the action was an automobile and the wrongful conversion by defendants seems to be admitted. Defendants assert that the evidence shows that the automobile belonged to the wife alone and therefore the husband was improperly joined as plaintiff; citing Harris v. Brain, 33 Ill. App. 510, and Misek v. Village of LaGrange, 239 Ill. App. 360, and like cases. It is undoubtedly true that in order to maintain an action in trover, plaintiff must show his right to possession and to do this must show either a general of special property in the thing converted. Plaintiff must recover on the strength of his own title or right of possession and not upon the weakness of the defendant. Manufacturers Mercantile Co. v. Monarch Refrigerating Co., 169 Ill. App. 562; Ridge v. Giffrow, 230 Ill. App. 590; Nettleton v. Kerr, 167 Ill. App. 74; and like cases.

The evidence shows that Mr. P. L. Emerson bought the automobile in question, receiving a bill of sale for the same. It was kept in the garage connected with the home of plaintiffs. Emerson says that on the morning of Christmas, 1925, he gave it to his wife;

[illegible] MERCHSON and WIFE, P. L. [illegible], Appellees, vs. [illegible] AUTO EXCHANGE, Inc., and [illegible] WARDEN, Appellants.	APPEAL FROM MONTGOMERY. DOWNEY, OF COUNTY.

MR. PRESIDING JUSTICE BARRETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment against them for $3,000 entered upon the trial by the court of an action of [illegible]over. Only two points are presented for reversal: (1) defendants' [illegible] liability; and (2) the amount of the judgment is excessive.

The subject matter of the action was an automobile and a wrongful conversion by defendants cause to be admitted. Defendants asserts that the evidence shows that the automobile [illegible] the wife alone and therefore the Tenhoeve was improperly joined [illegible] plaintiff; citing Martin v. Trask, 83 Ill. App. 630, and Mizen v. [illegible] Piano Co., 238 Ill. App. 300, and like cases. It is unquestionably true that in order to maintain an action in trover, plaintiff must show his right to possession and to do this must show [illegible] a general or special property in the thing converted. Plaintiff must recover on the strength of his own title or right of possession and not upon the weakness of the defendant. Mandelstamm [illegible] v. General Telephone Co., 280 Ill. App. 328; [illegible] v. Gilliam, 236 Ill. App. 99; Kaplan v. Kent, 187 Ill. App. [illegible] and like cases.

The evidence shows that Mr. P. L. Merchson bought the automobile in question, receiving a bill of sale for the same. It was kept in the garage connected with the home of plaintiffs. Mrs. [illegible] says that on the morning of December, 1928, he gave it to his wife;

that afterwards he and Mrs. Emerson respectively used the car whenever either wished to; that he made the affidavit in the replevin suit alleging that he was the owner of the car because "he would have to take it back," as they were having a lot of trouble about it. Were this a controversy between Mr. Emerson and his wife, it might be a nice question as to which had title to the car; yet there is no doubt that either or both of them had the right of possession. There was an arrangement for the joint use of the automobile and was the proper basis for an action of trover in the names of both of them.

Furthermore, the question of misjoinder of parties plaintiff cannot be raised for the first time in the Appellate court. The capacity in which a plaintiff sues can be questioned only by special plea, and not having been so raised the objection is waived and cannot be urged for the first time in the court of review. Liska v. Chicago Rys. Co., 318 Ill. 570; Chicago Legal News Co. v. Browne, 103 Ill. 317; Pennsylvania Co. v. Chapman, 220 Ill. 428.

Any defect in parties might have been remedied by amendment, and since it does not affect the merits of the case, affords no ground for a reversal of the judgment. Mengelkamp v. Consolidated Coal Co., 259 Ill. 305; Highway Commissioners v. Bloomington, 253 Ill. 164; Cox v. Commissioners of Highways, 194 Ill. 355.

While there was evidence tending to show that the value of the car was considerably less than the amount awarded by the court, yet the finding in this respect was well within the scope of the testimony. The trial Judge had the opportunity of passing upon the credibility of the witnesses by hearing them testify and observing their conduct and demeanor on the witness stand. There is not sufficient in the record to justify us in disagreeing with the conclusion of the court as to the amount of the judgment.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

Hatchett and Johnston, JJ., concur.

J. Jones

that afterwards he and Mrs. Emerson respectively paid the car compensation claimed; that he made the affidavit in the negotiation alleging that he was the owner of the car because "he would have to take it back," as they were having a lot of trouble about it. Was this a controversy between Mr. Emerson and his wife, is might be a nice question as to who had title to the car; yet there is no doubt that either or both of them had the right of possession. There was an arrangement for the joint use of the automobile and was the proper basis for an action of trover in the name of both of them.

Furthermore, the question of misjoinder of parties plaintiff cannot be raised for the first time in the Appellate court. The remedy is plain: a plaintiff was can be restrained only by special plea, and not by mere proof of raised the objection in point was cannot be raised for the first time in the court of review. Illinois v. Chicago Ry. Co., 218 Ill. 270; Chicago Coal Co. v. Barrow, 161 Ill. 67; Pennsylvania Co. v. Sheppard, 84 Ill. 214.

Any defect in parties might have been remedied by amendment, and since it does not affect the merits of the case, affords no ground for a reversal of the judgment. Kentucky v. Chicago Junction Ry., 194 Ill. 97; Chicago Consolidated v. Kinnelon, 221 Ill. 141; Ewe v. Commissioners of Lawrence, 164 Ill. 214.

While there was evidence tending to show that the value of the car was somewhat greater than the amount awarded by the court, yet the finding in this respect was well within the range of the testimony. The trial judge had the opportunity of seeing and the credibility of the witnesses by hearing them testify and observing their conduct and demeanor on the witness stand. There is not sufficient in the record to justify us in disagreeing with the conclusion of the court as to the amount of the judgment.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

Brackett and Johnston, JJ., concur.

Printed in the Property of Commerce, 1928, in

428 - 31560

SAMUEL B. BLANKSTEN and HARRY FREEMAN, Copartners Doing Business as BLANKSTEN & FREEMAN, Appellants, vs. KRAWITZ DRUG & TRUSS COMPANY, a Corporation, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs, who are practicing attorneys at this bar, brought suit against defendant claiming $532 for legal services alleged to have been rendered by them at the request and on behalf of the defendant. Upon trial by a jury they had a verdict for $30, and from the judgment for this amount they appeal.

Plaintiffs argue that the verdict is manifestly contrary to the evidence, while defendant's counsel argue that the evidence shows that the services were rendered at the instance and request of parties other than the defendant.

The defendant company operated a drug store in Chicago, in which Edward Langan had the soda fountain concession under a lease expiring March 4, 1926. The G. B. & G. Concession Company is apparently a partnership composed of Messrs. Goldstein, Belden and Galnick, operating luncheon concessions. The jury could properly believe that Blanksten, one of the plaintiffs, was retained by the Concession Company as its attorney in the summer of 1925; that in the fall of 1925 the Concession Company approached Charles Krawitz, the president of defendant company, and proposed taking over Langan's concession after his lease expired; they arrived at an agreement and Blanksten drew a contract to this effect; the Concession Company was not content to wait until Langan's lease expired, but became active

with a view of getting Langan out before that time and approached Krawitz with suggestions as to how this might be done. Galnick and Goldstein told Krawitz that they employed Blanksten on an annual retainer and that he would undertake to do the necessary legal work to get Langan out without liability or expense to Krawitz; Galnick and Goldstein had conferences about three or four times a week with Blanksten, who advised that it would be necessary to institute legal proceedings for the purpose of compelling Langan to vacate; that Blanksten drew up a letter addressed to Blanksten and Freeman as follows:

> "With reference to the notice which we served on Edward Langan, notifying him to vacate the premises at 811-813 Roosevelt Road, which we occupy as a drug store, we hereby retain you as our attorneys for the purpose of instituting such legal proceedings as are necessary to compel Edward Langan to vacate the premises he now occupies and to evict him therefrom."

Galnick and Goldstein presented this letter to Krawitz explaining that Blanksten had advised that any legal proceedings against Langan must be brought in the name of defendant, but that these proceedings were to be without expense to the defendant and that the expenses for same would be paid by Goldstein, Galnick and Belden; defendant then signed the letter; around January 2, 1926, the Concession Company came to an agreement with Langan whereby he received a check from Goldstein as part consideration for vacating the premises; the Concession Company thereupon took possession and proceeded to operate the soda fountain in defendant's drug store; about January 15, 1926, Krawitz received a bill from plaintiffs for legal services for $125, which he gave to Goldstein, who said he would take care of it. From this and other evidence in the record the jury was justified in finding that plaintiffs were employed to furnish the legal services in question by Goldstein, Galnick and Belden operating the Concession Company, and not by the defendant.

It is argued that the verdict of $30 was a compromise

with a view of getting Langan out before that time and experienced lawyers with suggestions as to how this might be done. Gaulick and Tatarsky told Kyrwitz that they employed Blankstone on an annual retainer and that he would undertake to do the necessary legal work to get Langan out without liability or expense to Kyrwitz; Gaulick and Goldstein had conferences about three or four times a week with Blankstone, who advised that it would be necessary to institute legal proceedings for the purpose of compelling Langan to vacate; that Blankstone drew up a letter addressed to Blankstone and Brown as follows:

> "With reference to the matter which we served on behalf of Langan, demanding him to vacate the premises at 221-223 Broadway, New York, which we assume he is now doing, we hereby retain you as our attorneys for the purpose of instituting such legal proceedings as are necessary to compel Edward Langan to vacate the premises he now occupies and to evict him therefrom."

Gaulick and Goldstein accepted this letter in writing.

Gaulick and Goldstein had advised that by legal proceedings against Langan must be brought in the name of defendant, but that these proceedings were to be without expense to the defendant and that the expenses for same would be paid by Goldstein. Gaulick and Goldstein; defendant then signed the letter; around January 5, 1956, the Consolidation Company came to an agreement with Langan whereby he received a check from Goldstein as part consideration for vacating the premises; the Consolidation Company thereupon took possession and proceeded to operate the work (counsel in defendant's drug store; about January 16, 1956, Kyrwitz received a bill from plaintiffs for legal services for $150, which he gave to Goldstein, who said he would take care of it. From this and other evidence in the record the jury was justified in finding that plaintiffs were employed to render the legal services in question by Goldstein, Gaulick and Gaulick representing the Consolidation Company, and not by the defendant.

It is argued that the verdict of $50 was a compromise

verdict. This is evidently the amount of costs advanced by plaintiffs in the legal proceedings, and the jury might well believe that it was only proper for the defendant to be taxed with this, as these proceedings were conducted in its name; also in view of the fact that at one time defendant offered to stand a part of plaintiffs' bill. In any event, the allowance of an amount less than the whole amount claimed cannot of itself, in the present case, be sufficient ground for reversing the judgment.

Some complaint is made of the rulings of the court on the introduction of evidence and the giving of instructions; but errors, if any, in this respect are not of sufficient importance to justify a reversal.

We cannot say that the verdict is manifestly against the weight of the evidence, and the judgment entered thereon is therefore affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

54 - 31177

ARMOUR & COMPANY, a Corporation, Appellant,	)	
vs.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
M. L. BARRETT & COMPANY, a Corporation, Appellee.	)	

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff, Armour & Company, from a judgment in favor of the defendant, M. L. Barrett & Company, in an action brought by the plaintiff to recover damages for an alleged breach of contract by the defendant.

The plaintiff alleges that the defendant entered into a contract with the plaintiff to sell plaintiff 16,000 gallons of olive oil to be shipped from Spain and to be delivered to the plaintiff; that the defendant refused to deliver the oil; that the plaintiff was compelled to purchase the oil in the open market at an increased price, and that as a consequence the plaintiff was damaged to the amount of $2621.60 with interest.

The defendant denied that it entered into such a contract, and also pleaded the Statute of Frauds.

The case was tried before the court without a jury.

The principal facts, which are not in dispute, are contained in the correspondence between the parties. The plaintiff manufactured soap and wanted the oil to use in making soap. The defendant was a dealer in raw materials, and as such dealer imported olive oil. The negotiations for the purchase of the oil in question were begun with the plaintiff by Justine Weinshenk, who represented the Brazilian and Columbian Coffee Company, an importing firm. But as the Brazilian and Columbian Coffee Company did business on the basis of Spanish Exchange and as the plaintiff

bought only on the basis of United States Exchange, the matter was turned over to the defendant, who agreed to quote the plaintiff prices in United States Exchange.

In the negotiations with the defendant, the plaintiff was represented by Edward F. Martin and the defendant by George H. Suddard. On January 4, 1924, Weinshenk, representing the Brazilian and Columbian Coffee Company, submitted to Martin for analysis a sample of oil which Weinshenk said was about 2 per cent acidity and was neutralized and denatured. The sample had a label of the defendant on it. On January 7, 1924, Weinshenk wrote to the plaintiff as follows:

"The writer called at your office on the 4th inst. but did not have the pleasure to meet you personally.

On that occasion I left with your Mr. Gebhart 1 sample of Commercial olive oil:

Quality: Denatured and neutralized with acidity not exceeding 2%.

This oil is slightly inferior quality to our previous oils submitted, althe the acidity contents is only 2%, instead of 5%.

It would interest us, if this new type submitted would be of interest for your requirements, as this oil can be had at considerable lower quotations than the other type first submitted.

This oil is particularly used in both Spain and other countries for soap manufacturing purposes, having proven itself quite advantageous.

Since submitting this oil, the market has again taken a very notable climb, as the Spanish and European markets show daily more and more, the unexpected large shortage.

Your kind informations on this new quality awaited, and trusting that, if of interest, you will communicate for prices, with Messrs. M. L. Barrett & Co., we beg to remain,

Yours very truly,
Brazilian & Columbian Coffee Co.,
by J. Weinshenk."

Having received from its laboratory a report which showed that the oil was suitable for the manufacture of soap, the plaintiff wrote the Brazilian and Columbian Coffee Company on January 8, 1924, as follows:

"Attention Mr. J. Weinshenk.

Gentlemen:

Your letter of the 7th received. We have talked with Mr. Suddard this morning and have made him an offer of 95c f.o.b. New York for 200 barrels of Olive oil -

100 bbls. Jan. shipment from abroad and 100 bbls. Feb. shipment from abroad.

Trying only on the basis of United States Statutes, the matter was turned over to the defendant, who agreed to quote the plaintiff prices in United States Currency.

In the negotiations with the defendant, the plaintiff was represented by Edward F. Martin and the defendant by George H. Hubbard. On January 4, 1924, Weinbaum, representing the Brandilian and Calumbian Office Company, submitted to Martin for analysis a sample of oil which Weinbaum said was about 2 per cent acidity and was neutralized and inactivated. The sample had a label of the defendant on it. On January 7, 1924, Weinbaum wrote to the plaintiff as follows:

"The writer called at your office on the 4th inst. but did not see the gentleman he most you personally.

The main question I left with your Mr. Hubbard a sample of Cassoreal olive oil:

Quality: Neutralized and inactivated with acidity not exceeding 2%.

This oil is slightly inferior quality to our previous oils sometimes, with the acidity sometimes is only 1%, instead of 2%.

It would interest us, if this new type submitted would be of interest for your requirements, as this oil can be had at specifically lower quotations than the other type first submitted.

This oil is particularly used in both Spain and other countries for soap manufacturing purposes, having proven liquid pale advantageous.

Since receiving this oil, the market has again taken a very notable climb, as the Spanish and European markets are daily more and more, the materials large shortage.

Just also information of this new quality mentioned, and trusting that, if of interest, you will immediate for prices, with Remain, R. L. Barrett & Co., we beg to remain,

"Very truly yours,

Brandilian & Calumbian Office Co.,

By J. Weinbaum."

Having received from the laboratory a report which showed that the oil was not liable for the manufacture of soap, the plaintiff wrote the Brandilian and Calumbian Office Company on January 8, 1924, as follows:

"Letter Mr. E. Weinbaum,

Gentlemen:

Your letter of the 7th received. We have talked with Mr. Martin this morning and have sent him on after of the f.o.b. New York for the quantity of Olive oil -

Inc. Vin. Jos. Gilbert Fine Olives and Oil Co.

Pub. Minutes from course.

equal in every respect to sample you submitted, N. Y. re weights f. o. b. cars New York, denatured. We made this bid subject to cable confirmation and Mr. Suddard thought you would have reply by tomorrow noon.

Awaiting your advices with interest, we remain,

Very truly yours,
Armour Soap Works,
Edw. P. Martin."

To this letter the Brazilian and Columbian Coffee Company replied on January 9, 1924, as follows:

"Attention Mr. Edward P. Martin:

Dear Sirs:

We thank you for your reply of the 8th pertaining to new sample of Olive Oil submitted to you by the writer, in behalf of our shippers abroad, Messrs. Carbonell Y Cia.

After taking the matter up with Mr. Suddard, of M. L. Barrett & Co. of this city, we are authorized to give you the following quotations, based on our price quoted in pesetas, and which they in turn are able to offer to you on the U. S. currency basis.

Please note the following, subject to Carbonell's final cable acceptance:

M. L. Barrett quote this oil f. o. b. New York in Barrels, at 95c per gallon. In this case, all risks remain on your hands.

In Tanks, they will have to ask $1.00 per gallon, in which case they are taking upon themselves all risks, which could be incurred on goods shipped in Barrels.

Carbonell offered to us: 150 Barrels for shipment in January
additional: 150 Barrels, for shipment in February
additional: 150 Barrels, for shipment in March from Spain.

It is very difficult to obtain March quotations at this time as the market is daily advancing most rapidly, and since our recent communications with you, has taken on quite a serious aspect.

Trusting that we will now have the pleasure to serve you, thru our good friends, Messrs. M. L. Barrett & Co., and with the kindest regards from the writer, we beg to remain,

Yours very truly,
Brazilian & Columbian Coffee Co.,
by J. Weinshenk."

On January 11, 1924, the plaintiff wrote the Brazilian and Columbian Coffee Company as follows:

"Attention Mr. J. Weinshenk.

Gentlemen:

Your letter of the 9th received. We have written M. L. Barrett and Company under separate cover in regard to this Olive Oil like sample recently submitted.

We note that you specify 150 barrels in your offering for January-February-March. This will be perfectly satisfactory to us. We would just as soon have 150 barrels in each car providing

equal in every respect to anyone you mentioned, E. T. or perhaps F. G., more New York, dumbwaiter. We made this a bid subject to office confirmed and Mr. Gaskard thought you would have reply by tomorrow noon.

Awaiting your advices with interest, we remain,

Very truly yours,

Lucore Bean Works,

Edw. P. Martin."

To this letter the Kranzlin and Columbian Coffee Company replied on January 9, 1924, as follows:

"Attention Mr. Edward P. Martin:

Dear Sirs:

We thank you for your reply of the 4th pertaining to new supply of Office Gift samples to you by the writer, in behalf of our principals abroad, Kranzlin, Gutbrenell Y Cia.

After taking the matter up with Mr. Gaskard, of H. L. Barrett & Co. of this city, we are authorized to give you the following quotations, based on our price quoted in previous and which they in turn are able to offer to you on the H. S. warehouse basis.

Please note the following, subject to Gutbrenell's final confirmation:

H. L. Barrett quotes this city F. O. B. New York in Barrels, at 17c per pound. In this case, all items remain on your stock.

In Tins, they will have it ask 21.00 per gallon, in which case they are going upon discovery all items, which would be laundered as you believed to Barrels.

Gutbrenell offers in us: 1,000 Barrels for shipments in January

February

March: 1,000 Barrels, for shipment in February

April: 1,000 Barrels, for shipment in March from Spain.

It is very difficult to obtain these quotations at this time as the market is daily advancing more rapidly, as there are important commitments with you, then later on quite a serious question.

Trusting that we will now have the pleasure to serve you, thus our good friends, Messrs. H. L. Barrett & Co., and with the slight remarks from this writer, we beg to remain,

Yours very truly,

Kranzlin & Columbian Coffee Co.,

By J. Weinmann."

On January 11, 1924, the plaintiff wrote the Kranzlin and Columbian Coffee Company as follows:

"Attention Mr. J. Weinmann.

Gentlemen:

Your letter of the 9th received. We have written H. L. Barrett and Company quite separate cover in regard to this Office Gift line samples recently submitted.

We note that you usually 1,000 barrels in your offering for January-February-March. This will be perfectly satisfactory to us. We could just as have 1,500 barrels in each one providing

it can be transported safely without any danger of damage or leaking and we presume during the cold weather this can be done without difficulty. We now await receipt of your reply.

Very truly yours,
Armour Soap Works,
Edw. P. Martin."

On January 12, 1924, following a telephone conversation between Martin, representing the plaintiff, and Suddard, representing the defendant, the plaintiff wrote the following letter to the defendant:

"Attention Mr. G. H. Suddard.

Gentlemen:

Confirming our telephone conversation - we have bought from you two tank cars of 160 barrels each (or 8,000 gallons each) Olive Oil, equal in every respect to the sample submitted by Mr. Weinshenk on January 4th; shipment 160 barrels each February and March from abroad, same to be loaded in our tank cars and denatured without any expense whatsoever to us, N. Y. official weights, drafts to be paid on presentation of documents in perfect order, price $1.00 per gallon f. o. b. New York.

We have a small portion of this sample left and we would like to have you or Mr. Weinshenk send us another bottle of about 4 ounces so we can have it to serve as a type sample. No doubt Mr. Weinshenk has shown you copy of his letter which will explain to you regarding the quality of this oil. We are sure that the oil delivered is fully equal to sample submitted which we have tested with great care and which we find well suited to our needs.

Very truly yours,
Armour Soap Works,
E. P. Martin."

On the same day, January 12, 1924, before receiving the letter of the plaintiff, the defendant had written the plaintiff as follows:

"Attention Mr. E. P. Martin.

Gentlemen:

As mentioned over the phone to you, we have entered your order for two cars of Olive Oil as per sample submitted through the Brazilian & Columbian Coffee Company.

One car of 160 barrels for February shipment from Spain; one car for March shipment from Spain. These cars to be bulked at New York in a tank car. The price $1.00 per gallon in tank, f. o. b. New York. Terms net cash against bill of lading. The contract embodying these features will be sent for your signature separately.

We can assure you that we thank you for this business, and we trust it will be but the beginning of further and more important transactions.

Yours truly,
M. L. Barrett & Co."

On January 14, 1924, the plaintiff wrote the defendant the following letter:

"Attention Mr. G. H. Suddard.

Gentlemen:

We have yours of the 12th confirming the trade which we made with you by telephone on two tank cars of Olive Oil, each of 8,000 gals. capacity.

You don't mention some of the features in the contract as noted in our confirmation of the 12th but we presume full details will be mentioned in final contract which you say will be sent to us very soon. Also please advise us in ample time just when you wish to have each tank car down for loading. We send a good many cars down to the Seaboard and, in all probability, can send over the empty tanks to the point where you desire to have them loaded without any trouble or any delay.

Awaiting your further advices, we remain,

Very truly yours,
Armour Soap Works,
Edward P. Martin."

On January 15, 1924, the plaintiff wrote the defendant the following letter:

"Attention Mr. G. H. Suddard.

Gentlemen:

Please do not overlook the request in our letter of the 12th to send us an additional sample of the Olive Oil which we have purchased from you.

Very truly yours,
Armour Soap Works,
By Edw. P. Martin."

On January 18, 1924, Suddard, representing the defendant, telephoned Martin, representing the plaintiff, that the defendant had made a mistake in the sample originally submitted to the plaintiff.

On January 18, 1924, the plaintiff wrote to the defendant as follows:

"Attention Mr. G. H. Suddard.

Gentlemen:

Referring to our letter of the 14th, and confirming our telephone conversation of today - the mix-up on this Olive Oil, made, as you say, by Mr. Weinshenk, is very unsatisfactory. The sample submitted shows the label of M. L. Barrett & Company, and we completed the purchase on the basis of this sample, as per our conversation of the 14th and written confirmation of same date.

We have sent our boy down to receive at your hands the other sample, but if this new sample does not meet your requirements as well as the sample submitted originally, we shall expect M. L. Barrett and Company to give us two cars in accordance

with our contract. We went to a good deal of trouble to test out this oil and arrive at this trade with you and, under the circumstances, we feel that if conditions were reversed you would be entirely justified in demanding material equal to what was purchased in accordance with sample submitted.

We sincerely hope that the sample you are now submitting to us will be equally satisfactory to our Laboratory in every respect as previous sample, a portion of which we have retained.

Very truly yours,
Armour Soap Works,
Edward P. Martin."

On January 22, 1924, the defendant wrote to the plaintiff as follows:

"Attention Mr. E. P. Martin.

Gentlemen:

Your letter of the 18th instant was duly delivered to us and we delivered to your messenger corrected sample of the Olive Oil upon which we quoted prices to you. We have since been waiting in hopes that you would find the new sample as satisfactory for your purposes as the one delivered to you just before.

As our Mr. Suddard explained to you over the telephone, when the Brazilian & Columbian Coffee Company on the 4th instant delivered the former sample at your office, they believed they were delivering sample of the oil now sent you. They wrote you on January 7th regarding the sample so delivered and calling your attention to the fact that the oil was denatured and neutralized with acidity not exceeding 2%, and that it was of slightly inferior quality to the oil previously submitted to you. As a matter of fact, the oil delivered to you on the 4th instant was identically the same oil of which a sample had previously been given you on the higher quotation. The examination and analysis made by your company could not fail to show that this was the case, and that an error had been made in the sample. The sample did not in any respect conform to the oil described in the Brazilian & Columbian Coffee Company's letter of January 7th.

The error apparently arose out of some transposition of labels on the sample cans. We did not discover it until receipt of your letter on the 12th inst. in which you asked for another bottle. It then developed for the first time that the sample delivered on January 4th was from the higher priced oil.

As indicated in our letter to you of the 13th instant and in your letter to us of the 14th instant, the transaction contemplated the preparation of a formal signed contract, and the error was discovered by us before such contract was consummated. In view of this fact, and especially in view of the fact that the error must have been apparent in your office upon an inspection and analysis of the sample, we cannot consent to delivering the higher grade oil at the lower price quoted.

We are still hopeful that you may find the last sample of oil submitted to you suitable for your purpose and shall be glad to fill your order on that oil on the terms indicated, provided you can give us the order within the next few days. Prices are advancing on these oils and we cannot keep this offer open more than five days.

Respectfully yours,
M. L. Barrett & Co."

On January 23, 1924, the plaintiff replied to this letter as follows:

"Attention Mr. G. H. Suddard.

Gentlemen:

We are in receipt of your favor of the 22nd in regard to the Olive Oil which we purchased from you as per sample submitted.

We have just received report from our Laboratory on sample which you sent to us for approval to take the place of the sample on which we consummated the purchase. We regret to say that your sample No. 235 does not fill the bill. It bleaches very poorly and the odor is not nearly so characteristic of Olive Oil as your No. 164. We therefore are unable to accept it in place of the material you sold and would like to know whether you prefer to supply the material we purchased, in accordance with our contract, or whether it is your wish to have us go out in the market and buy for your account.

We shall be glad to have your decision about this as early as possible because we have some offerings before us this morning which we shall be glad to take advantage of to apply on your sale to us, providing you will give us instructions to buy same in for your account.

Very truly yours,
Armour Soap Works,
Edward F. Martin."

On January 30, 1924, the defendant answered this letter as follows:

"Attention Mr. Edward F. Martin.

Gentlemen:

Your letter of the 23rd inst. is duly at hand. We regret that the last sample submitted to you does not meet with your requirements, and are most sorry to have any controversy or difference arise between us.

However, we believe we indicated our position to you quite clearly in our letter of the 22nd inst., which you say you received.

Yours truly,
M. L. Barrett & Co."

On January 31, 1924, the plaintiff wrote the defendant as follows:

"Attention Mr. G. H. Suddard.

Gentlemen:

Your letter of the 28th inst. received and noted. In view of the fact that you decline to deliver the 120,000 lbs. of Olive Oil which we purchased from you according to sample submitted and in line with your confirmation of the 12th, we are purchasing oil of a suitable quality on the open market on the best basis obtainable and will charge M. L. Barrett & Company with the difference between the price we have to pay and the price at which you sold it to us.

As soon as the deliveries are made on the purchases referred to, will render bill accordingly.

Yours very truly,
Armour Soap Works,
By Edward F. Martin."

Counsel for the defendant maintain that the evidence clearly shows "that the parties did not intend to be bound until the formal written contract had been executed." Counsel rely on the rule as stated in the case of El Reno Grocery Co. v. Stocking, 293 Ill., 494, 501, that although a valid contract may be made by correspondence, care should always be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation; that the question in such cases always is: Did the parties "mean to contract by their correspondence, or were they only settling the terms of an agreement into which they propose to enter after all its particulars were adjusted, which was then to be formally drawn up and by which alone they designed to be bound?"

It is also the rule that where the parties have assented to all the terms of the contract, the mere reference to a future contract in writing will not negative the existence of a present contract. Baltimore & Ohio Southwestern R. R. Co. v. The People, 195 Ill. 423, 428; Scott v. Fowler, 227 Ill. 104, 108. Furthermore, it is a rule of general acceptance that the contract agreed upon is an obligatory contract, although it may have been understood at the time that thereafter a formal instrument should be executed to express the agreement of the parties. Hall v. Hall, 128 Ill. 95, 101. In the case of Scott v. Fowler, 227 Ill. 104, the court quoted from Bishop on Contracts as follows (p. 108):

> "If parties agree on terms, however precise, 'subject to the preparation and approval of a formal contract,' the concurrence of their wills is suspended, and where nothing further is done there is no contract. Yet the mere fact that the reduction of an informal agreement, oral or written, to a formal written one was contemplated or stipulated for does not prevent the former from taking immediate effect. The question whether it does or not depends upon what the parties intended."

The precise question, therefore, to be determined in the case at bar, is whether the preponderance of the evidence shows that the parties intended that there should not be a binding con-

Counsel for the defendant maintain that the evidence clearly shows "that the parties did not intend to be bound until the formal written contract had been executed." Counsel rely on the rule as stated in the case of Mt Morris Tobacco Co. v. Hoeflin, 241 Ill., 484, 501, that although a valid contract may be made by correspondence, care should always be taken not to construe an agreement left open until the parties intended only as a preliminary negotiation, that the question in such cases always is: did the parties mean to contract by their correspondence, or were they only settling the terms of an agreement into which they proposed to enter after all the particulars were adjusted, which was shown to be usually known, or and by which alone they declared to be bound?"

It is also the rule that where the parties have reduced to all the terms of the contract, the mere reference to a future contract in writing will not negative the existence of a present contract. Building & Loan Association v. R. Co. v. The People, 81 Ill. 488, 492; Hoeft v. Fowler, 207 Ill. 104, 108. Furthermore, it is a rule of general acceptance that the contract agreed upon is an obligatory contract, although it may have been understood at the time that thereafter a formal instrument should be executed to express the agreement of the parties. Hall v. Hall, 93 Ill. 98, 102. In the case of Hoeft v. Fowler, 207 Ill. 104, the court quoted from Pomeroy on Contracts as follows (p. 124):

"If mention exists or terms, however trivial, subject to the representation and approval of a formal contract, the common sense of that will is manifested, and where nothing further is done there is no contract. Yet the mere fact that the reduction of an informal agreement, oral or written, to a formal written one has not satisfactorily or adequate for does not prevent the parties from being immediate effect. The question whether it was or was not intended that the parties be bound."

The jury is required, therefore, to be determined in the case at bar, to analyze the correspondence of the evidence shows that the parties intended that it was should not be a binding con-

tract until the formal written contract was executed. Since the defendant denies the existence of a contract, the burden of establishing the fact that the parties did not intend to be bound until a formal contract was executed, is on the defendant. Williston on Contracts, Vol. I, section 23, p. 37.

In our opinion the defendant has failed to prove this fact by a preponderance of the evidence. On the contrary we think that the preponderance of the evidence clearly shows that the parties did not intend that there should be no binding contract until the formal written contract, referred to in the correspondence, was executed. In our opinion the preponderance of the evidence shows that the terms of a complete binding contract had been agreed upon informally, and that it was the intention of the parties merely that these informal terms should be embodied in a formal written instrument.

It will be observed that in the defendant's letter of January 12th the defendant does not say that we <u>will</u> enter your order when the contract which we will send you is executed. The defendant states positively, without any qualification, "we have entered your order." The defendant then states specifically the terms on which the order was entered; and adds that the contract embodying "these features" will be sent to the plaintiff. It will be noted that the defendant does not say that any additional features will be embodied in the contract. The defendant only says that "these features," namely the terms agreed upon, will be embodied in the contract to be sent to the plaintiff. As we construe this letter of the defendant of January 12th, it was intended as a notice to the plaintiff that the defendant considered the plaintiff as already bound by the terms which had been agreed upon and which were stated in the defendant's letter; and that those terms or "features" would be embodied in a contract to be sent to the plaintiff.

that until the formal written contract was executed. Since the element during the existence of a contract, the burden of establishing the fact that the parties did not intend to be bound until a formal contract was executed, is on the defendant.

Williston on Contracts, Vol. 1, section 22, p. 27.

In our opinion the defendant has failed to prove this fact by a preponderance of the evidence. On the contrary we think that the preponderance of the evidence clearly shows that the parties did not intend that there should be no binding contract until the formal written contract, referred to in the correspondence, was executed. In our opinion the preponderance of the evidence shows that the issue of a complete binding contract had been agreed upon previously, and that it was the intention of the parties merely that those informal terms should be embodied in a formal written instrument.

It will be observed that in the defendant's letter of January 14th the defendant does not say that we will enter your order when the contract which we will send you is executed. The defendant states positively, without any qualification, "We have received your order." The defendant then states specifically the terms on which the order was accepted; and adds that the contract including "these terms" will be sent to the plaintiff. It will be noted that the defendant does not say that any additional terms will be embodied in the contract. The defendant only says that "these terms," namely the terms agreed upon, will be embodied in the contract to be sent to the plaintiff. In my construction of the letter of the defendant of January 14th, it was intended as a notice to the plaintiff that the defendant considered the plaintiff's order based in the defendant's letter; and that these terms or "terms" would be embodied in a contract to be sent to the plaintiff.

The plaintiff's letter of January 12th, which evidently crossed the defendant's letter of the same date, stated that "we have bought from you" two tank cars of 8,000 gallons each. The only fair inference from the phrase "we have bought" is that the plaintiff considered that it was bound and that the trade was closed. If the defendant had received this letter of the plaintiff of January 12th before the defendant wrote the letter of January 12th which crossed the plaintiff's letter, it may be that the defendant would have said nothing in its letter of January 12th in reference to a formal contract. Notwithstanding the reference to the formal contract in the defendant's letter of January 12th, we are of the opinion that the letters of the parties of January 12th were sufficient to bind both parties mutually by an obligatory contract, and that the parties so understood and intended. The correspondence following those two letters strengthens our conclusion. In its letter of January 14th the plaintiff uses this language: "We have yours of the 12th confirming the trade." In its letter of January 15th the plaintiff refers to the olive oil "which we have purchased from you." In its letter of January 18th the plaintiff said, "we completed the purchase on the basis of this sample." In its letter of January 22nd the defendant uses this language: "we are still hopeful that you may find the last sample of oil submitted to you suitable for your purpose, and shall we glad to fill your order on that oil <u>on the terms indicated</u>, provided you can give us the order within the next few days." The phrase "on the terms indicated" did not refer to the formal contract, for that contract had not been executed. The phrase, which will admit of but one reasonable construction, meant the terms agreed upon in the letters of January 12th. It will thus be seen that the defendant recognized that the terms had been agreed upon and that the defendant did not intend that the letters of January 12th should be considered as

The plaintiff's letter of January 12th, which evidently covered the defendant's letter of the same date, stated that "we have bought from you" two tankcars of 8,000 gallons each. The only material difference from the phrase "we have bought" is that the plaintiff considered that it was bound and that the trade was closed.

If the defendant had received this letter of the plaintiff of January 12th before the defendant wrote the letter of January 14th which closed the plaintiff's letter, it may be that the defendant would have said nothing in its letter of January 14th in reference to a formal contract. Nothing concerning the reference to the formal contract in the defendant's letter of January 14th, we are of the opinion that the letters of the parties of January 12th were sufficient to bind both parties mutually by an obligatory contract, and that the parties so understood and intended. The correspondence following these two letters strengthens our conclusion. In the letter of January 16th the plaintiff wrote this language: "We have received of the 12th confirming the trade." In the letter of January 16th the plaintiff refers to the olive oil "which we have purchased from you." In the letter of January 18th the plaintiff said, "we shall initiate the production on the basis of this sample." In the letter of January 20th the defendant wrote this language: "We are still hopeful that you may find the last sample of oil which we sent you suitable for your purposes, and shall be glad to fill your order as soon as all on the terms indicated, provided you can give us the order within the next few days." The phrase "on the terms indicated" did not refer to the formal contract, for that contract had not been executed. The phrase, which will admit of but one reasonable construction, must have been agreed upon in the letters of January 12th. It will then be seen that the defendant recognized that the terms had been agreed upon and that the defendant did not contend that the letters of January 12th should be considered as

only preliminary negotiations, and that there should be no binding contract until a formal contract was executed.

Counsel for the defendant emphasize the importance of the following statement contained in the plaintiff's letter of January 14th: "you don't mention some of the features in the contract as noted in our confirmation of the 12th, but we presume full details will be mentioned in final contract which you say will be sent to us very soon." Counsel for the defendant maintain that this language of the plaintiff clearly indicates that the plaintiff recognized that there should be no binding contract until the formal written contract was executed. When taken in connection with all of the correspondence, we think that the language reasonably will not bear the interpretation that counsel give to it. Furthermore, we think that when considered independently of the other correspondence the language is not susceptible of the construction that counsel for the defendant place on it. It will be noted that just preceding this language the plaintiff has stated, "we have yours of the 12th <u>confirming the trade which we made with you</u>." In other words, when the plaintiff uses the phrase, "the trade which we have made," it is evident that the plaintiff considered that the trade was closed. Moreover, in the language relied on by counsel for the defendant it will be observed that the plaintiff refers to two contracts, - "the <u>contract</u> as noted in our confirmation of the 12th," and the "final contract" that the defendant was to send to the plaintiff. In referring to the contract of the 12th the plaintiff expressly admits that there was a contract already in existence, independently of the final contract which the defendant was to send; and there is nothing in the language in controversy in the letter of January 14th which would justify the inference that the plaintiff did not consider the contract referred to as the contract of January 12th as a binding contract. If the plaintiff had not regarded itself as bound by

only preliminary negotiations, and that there could be no binding contract until a formal contract was executed.

Counsel for the defendant emphasize the importance of the following statement contained in the plaintiff's letter of January 14th: "you don't mention some of the features in the contract as noted in our conversation of the 12th, but we presume full details will be mentioned in final contract which you may will be good enough to us very soon." Counsel for the defendant maintain that this language of the plaintiff clearly indicates that the plaintiff recognized that there should be no binding contract until the final written contract was executed. When taken in conjunction with all of the correspondence, we think that the language complained of will not bear the interpretation that counsel give to it. Furthermore, we think that some considerable independently of the other correspondence the language is not susceptible of the construction that counsel for the defendant place on it. It will be noted that just preceding this language the plaintiff has recited the terms of the 12th modification but it does not end with "yours," in other words, that the plaintiff was the sender, "the terms which we have made," it is evident that the plaintiff considered that the trade was closed. Moreover, in the language recited as by counsel for the defendant, it will be observed that the plaintiff refers to two contracts. - "the contracts as noted in our conversation of the 12th," and the "final contract" that the defendant was to sent to the plaintiff. In particular to the contract of the 12th the plaintiff expressly stated that there was a contract already in existence, independently of the final contract which the defendant was to send; and there is nothing in the language in controversy in the letter of January 14th which would justify the inference that the plaintiff did not consider the contract referred to as the contract of January 12th as a binding contract. If the plaintiff had not regarded itself as bound by

the contract designated as the contract of January 12th and had deemed the "features" that the defendant failed to mention of such importance as to necessitate another contract, it is probable that the plaintiff would have stated explicitly in the letter of January 14th that since the defendant failed to mention "the features" the plaintiff was released from the contract of January 12th, and that the negotiations would be re-opened pending the receipt of the final contract. Apparently, however, the plaintiff did not consider the omitted features of sufficient importance to require further negotiations, and seemed willing to abide by the contract of January 12th, whether the formal contract contained "the features" or not.

Counsel for the defendant further contend that among the dealers in olive oil which is imported from abroad, a general custom existed of executing formal contracts in all transactions for the sale of the oil; and counsel argue that in view of this custom it is a reasonable presumption that the parties did not intend that there should be a binding contract until the formal contract was executed.

The only evidence of such a custom was the testimony of Suddard, who testified on behalf of the defendant. His testimony, which was very brief, is as follows:

> "Q. Are you acquainted with the custom of the dealers in olive oil for importers from abroad with respect to the execution of a formal written contract covering sales made by them?
> A. Yes.
> Q. I ask you if you are acquainted with that. Is that a general custom in the trade? Is there or is there not a general custom in the trade concerning such execution?
> Objection made and over-ruled.
> A. There is.
> Q. What is the general custom, Mr. Suddard?
> A. The general custom is to prepare and submit for signature a formal contract, particularly in imported goods, which provides for many things, risk of sea, export duties --."

The rule in regard to the proof of a custom in reference to which a contract has been executed, is stated in the case of Bissell v. Ryan, 23 Ill. 517, as follows (p. 521):

"The proper office of a custom or usage in business is to ascertain and explain the intent of the parties, and it cannot be in opposition to any principle of general policy, nor inconsistent with the terms of the agreement between the parties, or against the established principles of law. *** Besides all, it must be generally known and established, and so well settled and so uniformly acted upon as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference to it, and in conformity with it."

To that same effect are the following cases: Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Jenkins, 174 Ill. 398, 407; Wilson v. Bauman, 80 Ill. 493; Jones v. Vickers, 173 Ill. App. 481, 484, 485; Klaub v. Yokoun, 159 Ill. App. 434, 438, 439; Salland v. Irapat, 70 Ill. App. 228, 231; Sweet v. Leach, 6 Ill. App. 212, 214.

In our opinion the testimony of Suddard was wholly insufficient to establish the custom contended for by counsel for the defendant. Our conclusion is not based on the fact that the defendant attempted to prove the custom by one witness alone, although the courts of Illinois have held that a custom cannot be proved by a single witness. Bissell v. Ryan, supra, (p. 522); Andelman v. Chicago & Northwestern Ry. Co., 153 Ill. App. 169, 173; Kelly v. Carroll, 203 Ill. App. 309, 315; Adam Groth & Co. v. Goss & Guise, 232 Ill. App. 450, 454. In other jurisdictions, however, it has been held that one witness is sufficient. Vail v. Rice, 5 N. Y. (1 Selden) 155, 158; Robinson v. United States, 13 Wall (U.S.) 363, 366; Jones v. Hoey, 128 Mass. 586, 587; In re Estate of Jones, 141 Ia. 615, 619; Penland v. Ingle, 138 N. C. 456, 457; Partridge v. Forsyth, 30 Ala. 200, 203; Southwest Virginia Mineral Co. v. Chase, 95 Va. 50, 57; 2 Wigmore, sec. 2053, p. 2741 (1st ed.); 17 Corpus Juris, sec. 92, p. 524. Our conclusion is based on the fact that the testimony of Suddard does not show that there was a custom such as the one contended for by counsel for the defendant, which was so generally known and well settled and so uniformly acted upon as to raise a fair presumption that it was known to both contracting parties and that they contracted in reference to it and in conformity

[illegible] "The proper meaning of a contract or usage in business is to ascertain and explain the intent of the parties, and it cannot be in opposition to any principle of general policy, nor inconsistent with the terms of the agreement between the parties, or against the established principles of law. Besides all, it must be generally known and established, and so well settled and so uniformly acted upon as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference to it, and in conformity with it."

To that same effect are the following cases: Gilpatrick v. Glidemeyer, Chicago & N. Ludlow R. Co. v. Tomkins, 174 Ill. 329, 47; Wilson v. Hanson, 80 Ill. 603; Isaac v. Wickers, 173 Ill. 488, 481, 485; Hanck v. Tolman, 160 Ill. App. 424, 430, 436; Cellini v. Ticket, 70 Ill. App. 228, 233; Brown v. Lemon, 8 Ill. App. 41, 44.

In our opinion the testimony of Stadhard was wholly insufficient to establish the custom contended for by counsel for the defendant. Our conclusion is not based on the fact that the defendant attempted to prove the custom by one witness alone. Although the courts of Illinois have held that a custom cannot be proved by a single witness, Illinois v. Ryan, supra, (p. 220); [illegible] v. Co. Co. v. Pittsburgh Ry. Co., 182 Ill. App. 169, 172; [illegible] v. [illegible], 177 Ill. App. 309, 314; Adam Brown & Co. v. Shaw, 232 Ill. App. 490, 494. In other jurisdictions, however, it has been held that one witness is sufficient. Voll v. Hine, 8 [illegible] 7, (Colorado) 176, 180; Robinson v. United States, 12 Wall (U.S.) 283, 302; Lewis v. Ewer, 172 Mass. 224, 227; In re Estate of Ebert, [illegible] 16, 218, 219; Mulford v. Cook, 134 N. Y. 444, 447; Pittsburg v. Pittsburg, 20 Ala. 300, 307; Southern Life Ins. Co. v. Chase, [illegible] Ta. 80, 87; "Wigmore", sec. 2055, p. 1742 (1st ed.); 17 Corpus Juris, sec. 93, p. 288. Our conclusion is based on the fact that the testimony of Stadhard does not show that there was a custom such as the one contended for by counsel for the defendant, which was so generally known and well settled and so uniformly acted upon as to raise a fair presumption that it was known to both contracting parties and that they contracted in reference to it and in conformity

with it.

Over the objection of the plaintiff the court admitted evidence offered by the defendant concerning the mistake that was made by the defendant as to the sample of oil submitted to the plaintiff.

Counsel for the defendant in their brief state the purpose for which the evidence was introduced as follows:

> "The defendant has at no time in this action urged the matter of this mistake as a defense to the action under that head of the law. The evidence was offered for the purpose of showing that the sample submitted to Armour & Company by Mr. Weinshenk on January 4, 1924, was not in fact olive oil known to the trade as 'commercial olive oil denatured and neutralized with acidity not exceeding two per cent,' but rather oil known as 'pure commercial olive oil with acidity not exceeding five per cent;' that M. L. Barrett & Company submitted said sample of olive oil upon January 4, 1924, honestly, whether negligently or not, believing this oil to have been olive oil of the former description and so believed it to be during all dealings and negotiations down to the discovery of the mistake made by Mr. Weinshenk January 15, 1924; that Armour & Company knew the same sample to be 'pure commercial olive oil with acidity not to exceed five per cent.' This being true throughout all the dealings here in controversy, there had been no meeting of the minds upon the very subject matter of the contract, the one dealing with respect to olive oil described as 'commercial olive oil denatured and neutralized with acidity not to exceed two per cent,' the other dealing with respect to a 'pure commercial olive oil with acidity not to exceed five per cent.' Such being the case, it is elementary no contract was consummated."

There is no evidence whatever that at the time that the plaintiff contracted for the purchase of the oil, the plaintiff knew that the defendant had made a mistake in the sample of the oil. Assuming, therefore, for the sake of argument, that the evidence introduced by the defendant in regard to the mistake made by the defendant was admissible, the evidence does not justify the inference contended for by counsel for the defendant, that "there had been no meeting of the minds upon the very subject matter of the contract."

In regard to the contention of counsel for the defendant that there was no memorandum in writing sufficient to satisfy that section of the Uniform Sales Act known as the Statute of

in it.

Over the objection of the plaintiff the court admitted evidence offered by the defendant concerning the alleged fact that was to be the defendant's be the sum of all authorized by the plaintiff.

Counsel for the defendant in their brief state the grounds for which the evidence was introduced as follows:

"The defendant has at no time in this action urged the matter of this minister as a defense in the action under that head of the law. The evidence was offered for the purpose of showing that the sum was paid to Armour & Company by defendant on January 4, 1924, was not in fact alive all known to the trade as 'commercial alive oil dissolved and neutralized with sodium hydroxide,' but rather all known as 'pure commercial alive oil with middle not exceeding five per cent;' that M. L. Burrett & Company which had sample of alive oil upon January 4, 1924, immediately, whether negligently or not, had analyzed this oil to have been alive oil of the former description and so believed it to be during all dealings and negotiations down to the delivery of the material made by it. February 18, 1924; that Armour & Company knew the same samples to be 'pure commercial alive oil with middle not to exceed five per cent.' While being true throughout all the dealings in controversy, there had been no meeting of the minds from the very middle letter of the contract, the one dealing with respect to alive oil described as 'commercial alive oil dissolved and neutralized with sodium hydroxide not to exceed two per cent,' the other dealing with respect to a 'pure commercial alive oil with middle not to exceed five per cent.' Much being the case, it is elementary no contract was consummated."

There is no evidence whatever that at the time that the plaintiff contracted for the purchase of the oil, the plaintiff knew that the defendant had made a mistake in the sample of the oil. Assuming, therefore, for the sake of argument, that the evidence introduced by the defendant in regard to the mistake made by the defendant was admissible, the evidence does not justify the instructions requested for by counsel for the defendant, that "there has been no meeting of the minds upon the very subject matter of the contract."

In regard to the contention of counsel for the defendant that there was no misrepresentation in writing sufficient to satisfy the section of the Uniform Sales Act known as the Statute of Frauds and that there was no misrepresentation in

Frauds, it may be said that from the views we have already expressed on the question whether the parties entered into an obligatory contract by their letters, it follows that in our opinion there was a sufficient memorandum in writing within the meaning of the Statute of Frauds.

For the reasons stated, the judgment of the trial court is reversed, with a finding of facts; and judgment will be entered in this court in favor of the plaintiff in the sum of $2621.20.

JUDGMENT REVERSED WITH FINDING OF FACTS
AND JUDGMENT ENTERED HERE.

McSurely, P. J., and Matchett, J., concur.

54 - 31177 FINDING OF FACTS.

We find as facts that the plaintiff and the defendant entered into a written contract whereby the defendant agreed to sell and deliver to the plaintiff 16,000 gallons of olive oil for February, 1924, and March, 1924, shipments from Spain at $1.00 per gallon f. o. b. New York, terms net cash against bill of lading; that the defendant wrongfully refused to deliver any of the oil; that the plaintiff purchased oil in the open market to replace the oil sold to it by the defendant; that the plaintiff was obliged to pay for the oil purchased in the open market $2621.60 in excess of the amount which the plaintiff would have paid if the defendant had performed its contract.

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NICHOLAS MOSER, Defendant in Error, vs. MARY MOSER, CHARLES REINHARDT and ELIZABETH REINHARDT, Plaintiffs in Error.	ERROR TO CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a writ of error prosecuted by Mary Moser, Charles Reinhardt and his wife, Elizabeth Reinhardt, the defendants, in a suit in equity brought by Nicholas Moser, the complainant, against the defendants. This writ of error is consolidated for hearing with an appeal, No. 31300, prosecuted by Charles Reinhardt and his wife, in the same suit in which Nicholas Moser was the complainant.

The bill of complaint alleges that the complainant and the defendant Mary Moser were married May 26, 1920, and lived together until about September 24, 1921, when Mary Moser deserted him; that subsequently, about September 27, 1921, she filed a bill of divorce against the complainant; that as a consideration of the marriage it was expressly agreed that the complainant should have a one-half interest in the stock of merchandise, fixtures, good will and profits in a grocery store and delicatessen conducted by Mary Moser; that the business had been purchased for about $1000 and was located at No. 5402 South Ashland avenue, a street in Chicago, Illinois; that prior to the purchase of the said business Mary Moser had conducted a grocery store and delicatessen at Laflin and 52nd streets in Chicago; that on taking possession of the business at No. 5402 South Ashland avenue, Mary Moser owed her father about $700 which she had borrowed from him to be used as part of the purchase price of the

business which she had conducted at Laflin and 52nd streets; that prior to his marriage to Mary Moser the complainant had given her approximately $650, and that about the date of the marriage he gave her $50 additional; that the $700 was given to her in trust with the agreement that it was to be invested in the business at No. 5402 South Ashland avenue, which was to be jointly owned and conducted by Mary Moser and the complainant; that from the marriage until about August 26, 1920, the complainant gave Mary Moser sums of money amounting approximately to $400, less living expenses, which were deducted; that these sums were given to Mary Moser by the complainant in trust, with the agreement that they were to be invested in the business conducted at No. 5402 South Ashland avenue, which was jointly owned by the complainant and Mary Moser; that about August 26, 1920, the complainant quit his occupation, which was that of a baker, and went to work in the store at No. 5402 South Ashland avenue, and gave all of his time and services to the business; that at the time he was making $40 a week as a baker; that he continued to work in the store at No. 5402 South Ashland avenue until he was forcibly ejected under a writ of injunction; that through the efforts of the complainant the business was greatly increased and also the amount of stock and merchandise; that the net profits of the business amounted to about $100 to $150 a week, all of which, except small sums for actual necessities, were taken possession of by Mary Moser; that on the date that the complainant was ejected, the business with the stock was reasonably worth $2000 and that it is now worth $1500; that Mary Moser deposited all of the profits of the business in various banks, some of the deposits being made in her married name and some in her name before her marriage to the complainant, and some in the name of her child by a former marriage; that Mary Moser now holds unlawfully large sums of money in which the complainant claims an interest, and for

which Mary Moser refuses to account.

That on January 10, 1922, Mary Moser dismissed the divorce suit which she had brought against the complainant, and on the same date sold the business at 5402 South Ashland avenue to the defendants Charles and Elizabeth Reinhardt for an alleged consideration of $800; that the Reinhardts are holding possession and claiming ownership of the business, knowing the facts and circumstances regarding the purchase of the business by the complainant and Mary Moser; that at the time of the sale the complainant was possessed of a one-half interest in the business as owner; that the sale was fraudulent in equity and void; that Mary Moser had no lawful right to sell or dispose of the business; that Mary Moser alone received the benefits of the sale and that the sale was a fraud on the part of all of the defendants as against the complainant; that by reason of the large amount of partnership funds approximately $1180 converted to her use by Mary Moser, together with the value of the business, estimated at $2000, the complainant claims that on a true and just accounting he will be entitled to the exclusive ownership and possession of the business.

The complainant prayed for an injunction without notice or bond, restraining the Reinhardts from selling or disposing of the business and also asked for the appointment of a receiver.

The complainant also prayed that an accounting be had in respect of the partnership business; that the partnership between him and Mary Moser be dissolved; that the sale to the Reinhardts be declared to be fraudulent and void; that the complainant be declared to be the sole owner of the partnership business; that the defendants be decreed to pay the complainant what, if anything, should appear to be due him on an accounting; that the complainant is ready and willing and offers to pay the defendants what, if anything, shall appear

to be due them on an accounting.

Service of summons was obtained on the Reinhardts, but Mary Moser was not found.

On January 28, 1922, the Chancellor granted an injunction against the Reinhardts without notice and without bond in accordance with the prayer of the bill; and appointed a receiver. On January 31, 1922, the Reinhardts filed a petition praying that the injunction be dissolved and that the order appointing the receiver be vacated. The Chancellor vacated the order appointing the receiver upon the Reinhardts filing an indemnifying bond.

The Reinhardts filed an answer to the complainant's bill, in which they denied all of the material allegations of the bill, with the exception of the marriage of the complainant, Mary Moser; and alleged that they were the true and lawful owners of the business. On December 16, 1922, Mary Moser entered her appearance. On December 18, 1922, the cause was referred to a Master to ascertain the interest, if any, of the complainant in the business; and to determine whether the Reinhardts had knowledge of such interest, if any, at the time that they purchased the business.

On December 19, 1922, Mary Moser filed an answer to the bill, in which she admitted that she and the complainant had been married and lived together, as alleged in the bill; admitted she had owned the business at Laflin and 52nd streets; alleged that the business at No. 5402 South Ashland avenue was purchased with her own money and was owned solely by her; alleged that the sale to the Reinhardts was valid; denied all of the other material allegations of the bill.

All of the defendants filed amendments to their answers, pleading the Statute of Frauds, Sections 8 and 9 of the Husband and Wife act, and sections 4 and 5 of the Uniform Sales act.

On June 30, 1924, the Chancellor found that a partnership existed between the complainant and Mary Moser; found all of

the other material allegations of the bill to be true; found that Mary Moser sold the business at No. 5402 South Ashland avenue to the Reinhardts for $1800, and that the complainant received no part of the $1800 and no part of the profits of the business; referred the cause to a Master to take and hear the evidence of an accounting in regard to the partnership and to report his conclusions of law and of fact. No appeal was prosecuted by the defendants from this decree.

On June 19, 1926, the Chancellor entered a final decree which is as follows:

"The court finds that on June 30, 1924, a decree was entered finding that complainant and defendant Mary Moser were copartners in grocery and delicatessen store at No. 5402 South Ashland avenue, Chicago, and that during said copartnership the defendant Mary Moser sold the property, assets and effects of said copartnership to Charles and Elizabeth Reinhardt for $1800, and that complainant received no part thereof, and that there should be an accounting between complainant and defendant Mary Moser in respect to said copartnership, and ordered said cause to be re-referred to Minian H. Welch, Master in Chancery, to take and hear evidence of an accounting of the said copartnership business at No. 5402 South Ashland avenue, from May 26, 1920, to the date of filing the bill, and also that said Master report his conclusions of evidence and law as to the rights of the complainant against Charles and Elizabeth Reinhardt.

"Court further finds from said report, evidence and decree that when Charles and Elizabeth Reinhardt purchased said delicatessen and grocery store, that said business was owned in copartnership between the complainant and defendant Mary Moser, and that said Reinhardts, and each of them, purchased with knowledge and notice of the rights of the complainant, and that said defendants have failed and refused to produce any books or records before the Master showing any accounts or transactions of said copartnership or to make any accounting in said business.

"The court finds that complainant is entitled to one-half of the sum which said Mary Moser sold said copartnership business to the defendants Reinhardts, which said sum was a fair and reasonable valuation of said business at the time of the purchase of same by said Reinhardts.

"The court finds that complainant is entitled to interest on said one-half of said $1800 from the date of said sale to the Reinhardts, January 10, 1922.

"The court finds that complainant paid out as Master's fees and for stenographers necessarily employed the sum of $125, and also paid out on the re-reference of second hearing for Master's fees the further sum of $144.50 and also $44.50 for stenographer's fees, making a total of $310.00.

"Ordered that exceptions of defendants Nos. 5, 6, 7, 8, 15, 17 and 19 to Master's report be and are sustained.

"Ordered, adjudged and decreed that complainant have and recover of and from defendants Mary Moser, Charles Reinhardt and Elizabeth Reinhardt the sum of $1,098.65 within thirty days, and

that upon failure to do so an execution issue.

"Ordered, adjudged and decreed that Master's fees of $75.00 for first hearing, and $144.50 for second hearing and reference, making a total of $219.50, be allowed and taxed against said defendants as part of the costs in this suit.

"Ordered, adjudged and decreed that complainant have and recover of the defendants the other and further sum of $219.50, his costs laid out and expended for stenographer's fees and to the Master, and that execution issue therefor.

"Ordered and decreed that complainant have and recover of the defendant the other costs of court to be taxed by the clerk and that execution issue therefor."

From this decree the Reinhardts appealed to this court, which appeal is numbered 31300; and from the decree all of the defendants prosecuted the present writ of error.

We have examined the evidence and we are of the opinion that the evidence supports the decree of June 30, 1924, and also the decree of June 19, 1926.

Counsel for the defendants contend that the partnership between the complainant and his wife, Mary Moser, has not been proved by a preponderance of the evidence.

We think that this contention is not correct.

The complainant testified that when Mary Moser owned the store at Laflin and 52nd streets, he had several conversations with her in which she asked him to lend her money; that she said she had to have money; that in some of these conversations she asked him to marry her; that he finally lent her money, giving it to her in various amounts at different times; that he gave her the first amount in November, 1919; that she promised to pay him back when she sold the store at Laflin and 52nd streets; that she sold that store and at the time of the sale said, "Well, Nick, I will pay you;" that she then bought the store at No. 5402 South Ashland avenue; that after she had bought that store she said to him, "Well, Nick, I owe you so much money, you have been lending me. It comes close to $700 what I owe you. We will get married and you will have that money go in the business and you will be in partnership both of us in this business;" that he said, "Well, all right, be ready tomorrow morning;"

that upon Juliette is to be an execution issue.

"Ordered, adjudged and decreed that Barber's fees of $75.00 for first hearing, and $144.00 for second hearing and reference, making a total of $219.00, be allowed and taxed against said defendants as part of the costs in this suit.

"Judged, adjudged and decreed that complainant have and recover of the defendants the other and further sum of $219.00, jointly held out and expended for stenographer's fees and to the Master, and that execution issue therefor.

"Ordered and decreed that complainant have and recover of the defendant the other costs of court to be taxed by the clerk and that execution issue therefor."

From this decree the Defendants appealed to this court, assigning in numbered 21000; and from the decree all of the defendants prosecuted the present writ of error.

We have examined the evidence and we are of the opinion that the evidence supports the decree of June 30, 1928, and also the decree of June 14, 1928.

Counsel for the defendants contend that the partnership between the complainant and his wife, Mary Moser, has not been shown by a preponderance of the evidence.

We think that this contention is not correct.

The complainant testified that when Mary Moser owned a store on Lafflin and 63rd streets, he had several conversations with her in which she asked him to lend her money that she said she needed to have money; that in each of these conversations she asked him to help her; that he finally lent her money, giving it to her in one amounts of different times; that he gave her the first [illegible] in November, 1928; that she promised to pay him back when [illegible] the store at Lafflin and 63rd streets; that she said that [illegible] and at the time of the sale said, "Well, Nick, I will pay you;" [illegible] times bought the store at Mr. 6800 South Ashland avenue; that [illegible] he had bought that store she said to him, "Well, Nick, I owe you much money, you have been lending me. It comes close to $7000 [illegible] I are you. We will get married and you will have that money; [illegible] the business and you will be in partnership both of us in this [illegible]" that he said, "Well, all right, be ready tomorrow morning;"

that on May 26, 1920, they married; that at that time he was making $45 a week and that he said to her, "Mary, here is my wages and this will go in with the business;" that he gave her his wages for about four months; that she said that she was paying a clerk $15 a week, that there was not enough money in the till, and that "If you stay home and tend to business" we will let the clerk go; that he, the complainant, quit his job in November, 1920, and went to the store to work, and worked there until about November 26 or 27, 1921; that in November, 1920, she said she owed her father $700 and wanted to pay him; that he, complainant, said "All right, if you take it out of your interest in the store;" that she paid her father; that she said that she had had the milk license transferred in his name; that subsequently they quarreled; that she took all the papers and money out of the safe; that she said to the complainant that if he would give her $700 or $800 he could have the business. The milk license was introduced in evidence and showed that it had been transferred to the complainant on October 21, 1920, for a period ending December 31, 1920.

Mrs. Minnie King, a sister of the complainant, with whom the complainant lived before his marriage, testified that she had a conversation with Mary Moser about July 15, 1921, in which Mary Moser said that before she sold the store at Laflin and 52nd streets, she sent to her father for money; that she said her father lent her $700 to start the first store; that he wrote back that if she wanted more money he wanted to go in partnership with her; that she said she did not want her father in partnership; that the complainant had worked in a baker shop and had put money in the business after she and the complainant got married; that she told him to quit and took him in partnership because the clerk was taking more money out of the till than she was putting in. The witness further testified that she saw the complainant in the

store waiting on trade.

Leonard King, husband of Mrs. Minnie King, also testified that he saw the complainant in the store waiting on customers.

The testimony of the complainant is contradicted by Mary Moser, but she in turn is contradicted in material matters by other witnesses than the complainant, and also by documentary evidence, and we think her testimony is unworthy of belief.

Counsel for the defendants further contend that the finding in the decree that the Reinhardts had notice of the complainant's interest in the business at No. 5402 South Ashland avenue is not supported by the evidence. We think that the contention is not correct.

There is direct and also circumstantial evidence that the Reinhardts had knowledge of the complainant's interest in the business when they purchased the business from Mary Moser.

The complainant testified that after his wife had sued him for divorce Charles Reinhardt said to him, "I hear you got trouble;" that he, the complainant, said his wife had left him; that Reinhardt said you "got the store on hand," and asked him if he wanted to sell it; that he, the complainant, said "This case is dependent in court;" that the store belongs to him and his wife; that Reinhardt offered to buy the store for $2500; that he, the complainant, said, "I cannot sell it. It belongs to my wife and I;" that Reinhardt said, "Get all what you can out of her;" that about three months later Reinhardt spoke to him again about the store in the presence of Mrs. Minnie King and her husband; that Reinhardt asked him, the complainant, how he was making out; that anytime he, the complainant, wanted to sell the business, he, Reinhardt, would buy it; that he, the complainant, said "Wait till the court decides."

Mrs. Minnie King testified that she had a conversation

ere waiting on trade.

Leonard King, husband of Mrs. Minnie King, also testified that he saw the complainant in the store waiting on customers.

The testimony of the complainant is contradicted by Mr. Moser, but she in turn is contradicted in material matters by other witnesses than the complainant, and also by documentary evidence, and we think her testimony is unworthy of belief.

It is claimed for the defendants further contend that the finding in the decree that the Reinhardts had malice of the complainant's interest in the business at Mr. Moser's death is not supported by the evidence. We think that the contention is not correct.

There is direct and also circumstantial evidence that the Reinhardts had knowledge of the complainant's interest in the business when they purchased the business from Mary Moser.

The complainant testified that after his wife had left him for divorce Charles Reinhardt said to him, "I hear you have trouble;" that he, the complainant, said his wife had left him; that Reinhardt said you "get the store on hand," and asked him if he intended to sell it; that he, the complainant, said "This case is pending in court;" that the store belongs to him and his wife; that Reinhardt offered to buy the store for $2800; that he, the complainant, said, "I cannot sell it. It belongs to my wife and I;" that Reinhardt said, "Put all what you can out of her;" that about two months later Reinhardt spoke to him again about the store in the presence of Mrs. Minnie King and her husband; that Reinhardt told him, the complainant, her he was making out; that anytime he, complainant, wanted to sell the business, he, Reinhardt, would buy it; that he, the complainant, said "what did the court decree?" Mrs. Minnie King testified that she had a conversation

with Charles Reinhardt about November 1, 1921, in her kitchen and that her husband and the complainant were present; that Reinhardt said, "Nick, how is the case coming?;" that Reinhardt said to the complainant, "Do you want to sell your half interest in that store?;" that the complainant said no, that he could not do anything until the case was decided; that Reinhardt said he would buy the moment that the complainant wanted to sell.

Leonard King, the husband of Mrs. Minnie King, testified substantially the same as his wife in regard to the conversation.

The evidence further shows that on January 7, 1922, while the suit for divorce between the complainant and Mary Moser was pending, the Reinhardts and Mary Moser entered into a written agreement for the sale of the business at No. 5402 South Ashland avenue to the Reinhardts; that in the suit for divorce the complainant had filed an answer, claiming an interest as partner in the business; that an order had been entered restraining Mary Moser from selling or disposing of the business; that on January 10, 1922, on the motion of Mary Moser, an order was entered dismissing the divorce suit; that on the same date the Reinhardts gave Mary Moser a check for $1800 in payment for the business.

Counsel for the defendants further contend that the decrees of June 30, 1924, and June 19, 1926, are not in harmony.

The argument of counsel in this respect proceeds largely on the assumption that the Reinhardts did not have knowledge of the complainant's interest in the business when they bought the business. In our opinion they did have such knowledge. In this view the decrees harmonize. Furthermore, if the bill of complaint should be construed as alleging that the complainant was entitled to the entire business, and not a half interest in the business, the fact that the Chancellor found that the complainant was entitled to one-half the

[illegible] Reinhardt about November 1, 1931, in her kitchen and [illegible] her husband and the complainant were present; that Reinhardt said, "Nick, how is the cook coming;" that Reinhardt said to the complainant, "Do you want to sell your half interest in that store;" that the complainant said no, that he could not do anything until [illegible] was dissolved; that Reinhardt said he would buy the moment that the complainant wanted to sell.

Leonard King, the husband of Mrs. Minnie King, testified substantially the same as his wife in regard to the conversation.

The evidence further shows that on January 7, 1932, while the suit for divorce between the complainant and Mary Moser was pending, the Reinhardts and Mary Moser entered into a written agreement for the sale of the business at No. 5605 South Halsted [illegible] to the Reinhardts; that in the suit for divorce the complainant had filed an answer, claiming an interest as partner in the business; that an order had been entered restraining Mary Moser from selling or disposing of the business; that on January 20, 1932, on the motion of Mary Moser, an order was entered dissolving the injunction; that on the same date the Reinhardts gave Mary Moser a check for $1500 in payment for the business.

Counsel for the defendants further contends that the [illegible] of June 30, 1932, and June 30, 1934, are not in harmony.

The argument of counsel in this respect proceeds largely [illegible] that the Reinhardts did not have knowledge of the complainant's interest in the business when they bought the business, [illegible] they did have such knowledge. In this view the defendants [illegible]. Furthermore, if the bill of complaint should be [illegible] as alleging that the complainant was entitled to the money [illegible] and was a half interest in the business, the fact that the master found that the complainant was entitled to one-half the

sum for which Mary Moser sold the business to the Reinhardts, would not be such a variance as would require a reversal of the decree. Heyman v. Heyman, 210 Ill. 524, 540.

Counsel for the defendants further contend that "the alleged ante-nuptial contract for the partnership was not in writing, and being in consideration of the marriage, was void and unenforceable." In support of their contention counsel cite the cases of McAnnulty v. McAnnulty, 120 Ill. 26, 33, 34, and Richardson v. Richardson, 148 Ill. 563, 567, which hold that marriage is not sufficient to take such an agreement out of the Statute of Frauds.

It is permissible for husband and wife to form a partnership with each other in business. Heyman v. Heyman, 210 Ill. 524, 531. Although the partnership agreement in the case at bar was not in writing, we are of the opinion that the performance of the parol contract took the contract out of the Statute of Frauds. The sole consideration of the contract was not the marriage. The complainant had lent Mary Moser money before the contract was made, and part of the consideration of the contract was that this money would be considered as having been invested in the business. In other words, independently of the agreement to marry, the complainant actually purchased an interest in the business for a money consideration. Furthermore, he gave his time and services in assisting to conduct the business. We think that the case at bar does not come within the rule announced in the cases of McAnnulty v. McAnnulty, supra, and Richardson v. Richardson, supra.

It is further contended by counsel for the defendants that there was no transfer or conveyance in writing of the business of Mary Moser to the complainant, as is required by section 9 of chapter 68 of the Illinois Statutes relating to Husband and Wife. Section 9 is as follows:

[illegible] Mary Moore said the business to the Plaintiffs, would [illegible] such a variance as would require a reversal of the decree. [illegible] v. Brown, 220 Ill. 224, 240.

Counsel for the defendants further contend that "the [illegible]ed ante-nuptial contract for the pecuniary was not in writing, [illegible]being in consideration of the marriage, was void and unenforce[illegible]." In support of their contention counsel cite the cases of [illegible]ville v. [illegible], 120 Ill. 28, 32, 34, and Richardson v. [illegible]ritz, 169 Ill. 363, 367, which hold that marriage is not [illegible]ident to take such an agreement out of the Statute of Frauds.

It is permissible for husband and wife to form a partner[illegible] with each other in business. Brown v. Brown, 220 Ill. 224, [illegible]

Although the pecuniary agreement in the case at bar was not [illegible]rting, we are of the opinion that the performance of the part[illegible]ract took the contract out of the Statute of Frauds. The sole [illegible]ideration of the contract was not the marriage. The complainant [illegible] that Mary Moore money before the contract was made, and part of [illegible]consideration of the contract was that this money would be con[illegible]ted as having been invested in the business. In other words, [illegible]mplainant's [illegible] of the agreement to marry, the complainant actually [illegible]ished an interest in the business for a money consideration. [illegible]ntracts, he gave his time and services in assisting to conduct [illegible]ness. To think that the case of bar does not come within [illegible]rule announced in the cases of Kennedy v. Kennedy, supra, and [illegible]rickson v. Richardson, supra.

It is further contended by counsel for the defendants [illegible] there was no transfer or conveyance in writing of the business [illegible]ary interest in the complainant, as is required by section 9 of [illegible]ter 59 of the Illinois Statutes relating to husband and wife. [illegible]ion 9 is as follows:

"A married woman may own, in her own right, real and personal property obtained by descent, gift or purchase, and manage, sell and convey the same to the same extent and in the same manner that the husband can property belonging to him: Provided, that where husband and wife shall be living together, no transfer or conveyance of goods and chattels between such husband and wife shall be valid as against the rights and interests of any third persons, unless such transfer or conveyance be in writing, and be acknowledged and recorded in the same manner as chattel mortgages are required to be acknowledged and recorded by the laws of this State, in cases where the possession of the property is to remain with the mortgagor."

We do not think that the statute is applicable to the facts in the case at bar. In our interpretation of the evidence the Reinhardts had full knowledge of the fact that the complainant had an interest in the business at the time that they purchased the business from Mary Moser; and the Reinhardts also knew at the time of their negotiations for the purchase of the business that there was a suit for divorce pending between the complainant and Mary Moser; and that the complainant had refused to consider an offer from Charles Reinhardt to purchase the business because of the pendency of the suit. In this view of the evidence the Reinhardts are not innocent third parties. On the contrary, in purchasing the business in the circumstances, they were wrongdoers as to the complainant. They should not be permitted, therefore, to use the statute to relieve themselves from the results of their own wrongdoing.

For the reasons stated the decree of the Chancellor is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

"A married woman may own, in her own right, real and personal property obtained by descent, gift or purchase, and manage, sell and convey the same to the same extent and in the same manner that the husband can property belonging to him; Provided, that where husband and wife shall be living together, no transfer or conveyance of goods and chattels between such husband and wife shall be valid as against the rights and interests of any third persons, unless such transfer or conveyance be in writing, and be acknowledged and recorded in the same manner as chattel mortgages are required to be acknowledged and recorded by the laws of this State, in order where the possession of the property is to remain with the mortgagor."

We do not think that this statute is applicable to the case in the case at bar. In our interpretation of the evidence the Reinhardts had full knowledge of the fact that the complainant had an interest in the business at the time that they purchased the business from Mary Beaver; and the Reinhardts also knew at the time of their negotiations for the purchase of the business that there was a suit for divorce pending between the complainant and Mary Beaver; and that the complainant had refused to consider an offer from Charles Reinhardt to purchase the business because of the pendency of the suit. In this view of the evidence the Reinhardts are not innocent third parties. On the contrary, in purchasing the business in the circumstances, they were wrongdoers as to the complainant. They should not be permitted, therefore, to use the statute to relieve themselves from the results of their own wrongdoing.

For the reasons stated the decree of the Chancellor is affirmed.

AFFIRMED.

163 - 31300

NICHOLAS MOSER,
Appellee,

vs.

MARY MOSER et al.

On Appeal of CHARLES REINHARDT and ELIZABETH REINHARDT,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Charles Reinhardt and his wife, Elizabeth Reinhardt, from a decree in favor of Nicholas Moser, the complainant, in a suit in equity brought by the complainant against the Reinhardts and Mary Moser.

This appeal was consolidated for hearing in this court with the writ of error No. 31192, in which the same parties are interested and which involves the same questions as the appeal.

We have rendered a decision in the writ of error No. 31192, in which we affirmed the decree of the Chancellor. That decision is controlling on the questions presented in the present appeal.

The decree of the Chancellor is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

MR. JUSTICE BOURNOUN DELIVERING THE OPINION OF THE COURT.

This is an appeal by Charles Kalmanek and his wife, Elizabeth Kalmanek, from a decree in favor of Nicholas Moser, the complainant, in a suit in equity brought by the complainant against the Kalmaneks and Mary Moser.

This appeal was consolidated for hearing in this court with the suit of error No. 31908, in which the same parties are interested and which involves the same questions as the appeal.

We have rendered a decision in the suit of error. 31908, in which we affirmed the decree of the Chancellor. That decision is controlling on the questions presented in the present appeal.

The decree of the Chancellor is affirmed.

AFFIRMED.

161 - 31992

CHARLOTTE A. NICHOLS, Appellee, vs. YOUR CAB COMPANY, a Corporation, Appellant.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by Charlotte A. Nichols, the plaintiff, against Your Cab Company, the defendant, to recover damages sustained by the plaintiff when struck by a taxicab driven by a chauffeur employed by the defendant.

The case was tried before the court and a jury. The jury returned a verdict in favor of the plaintiff in the sum of $2500. The court entered judgment on the verdict. From the judgment the defendant has prosecuted this appeal.

The accident occurred at the intersection of Vincennes avenue and Oakwood boulevard, thoroughfares in the city of Chicago, at about 9:30 o'clock p. m. Vincennes avenue runs in a northerly and southerly direction, and Oakwood boulevard in an easterly and westerly direction.

The evidence relating to the manner in which the accident happened is conflicting.

On behalf of the plaintiff the testimony in substance is that the plaintiff was on the east side of Vincennes avenue intending to cross Oakwood boulevard at the intersection of the streets; that she reached the safety island in the center of the intersection; that she looked to the west and saw the taxicab about half a block away, coming from the west; that at the time she saw the taxicab "it was kind of slowing up;" that she then started to cross and when she had taken about one step after leaving the safety

island the taxicab struck her; that the horn of the cab was blown at the time; that when the horn was blown "the cab could not have missed hitting her;" that the taxicab was going at the rate of about fifteen miles an hour; that after striking the plaintiff the taxicab went a distance of about its length before it stopped.

There was testimony further on behalf of the plaintiff that several hours after the accident the son of the plaintiff saw the chauffeur of the taxicab at the hospital to which his mother had been taken and that in a conversation with the chauffeur, the chauffeur said that when the taxicab struck the plaintiff he was looking for a number his passenger had given him and that he did not see the plaintiff.

On behalf of the defendant the substance of the testimony is that the plaintiff "stepped out from behind the safety zone post right in front of the taxicab; that the taxicab was about four feet away from the plaintiff when she stepped from the safety island; that the horn of the taxicab was blown, but that just at that moment the plaintiff had stepped off of the safety island; that the taxicab was going at the rate of about twelve miles an hour.

Counsel for the defendant contends that the "plaintiff's own witnesses show a state of facts which indicate that, as a matter of law, the sole negligence was on the part of the plaintiff." We do not agree with this contention. The plaintiff testified that before she left the safety island she looked west on Oakwood boulevard and saw the taxicab coming on Oakwood boulevard from the west; that it was a half block away and was "kind of slowing up." This testimony presents a question of fact and not of law, as to whether she or the chauffeur of the taxicab was negligent.

On a consideration of all of the evidence we are of the opinion that the verdict of the jury was not manifestly against the weight of the evidence. The testimony is conflicting and the rule,

and the trailing stones dry; that the horn of the cab was blown
the time; that when the horn was blown "the cab could not have
and sliding bar;" that the trailer was going at the rate of about
[illegible] miles an hour; that after striking the plaintiff the trailer
[illegible] a distance of about ten lengths before it stopped.

There was testimony further on behalf of the plaintiff
[illegible] several hours after the accident the son of the plaintiff saw
[illegible] chauffeur of the trailer at the hospital to which his mother had
[illegible] taken and that in a conversation with his chauffeur, the chauf-
[illegible] said that when the trailer struck the plaintiff he was looking
[illegible] a number his passenger had given him and that he did not see the
[illegible]tiff.

On behalf of the defendant the testimony
[illegible] is that the plaintiff "stepped out from behind the safety
[illegible] post right in front of the trailer; that the trailer was about
[illegible] feet away from the plaintiff when she stepped from the safety
[illegible]; that the horn of the trailer was blown, but that just at
[illegible] moment the plaintiff had stepped off of the safety island; that
[illegible] trailer was going at the rate of about twelve miles an hour.

Counsel for the defendant contends that the "plaintiff's
[illegible] witnesses show a state of facts which indicate that, as a matter
[illegible] law, the sole negligence was on the part of the plaintiff." We
[illegible] not agree with this contention. The plaintiff testified that be-
[illegible]re she left the safety island she looked west on Kenwood boulevard
[illegible] saw the trailer coming on Kenwood beltline from the west; that
[illegible] was a half block away and was "kind of slowing up." This testimony
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[illegible]ther of the trailer was negligent.

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[illegible]ght of the evidence. The testimony is conflicting and the rule.

which is a familiar one, is that in such state of the record it is the special province of the jury to determine the credibility of the witnesses, the probability or improbability of their testimony; and that a court of review will not interfere with the verdict unless it is manifestly against the weight of the evidence. Hale Harvester Co. v. Hale, 201 Ill. 131, 146.

Counsel for the defendant further contend that the court erred in permitting the son of the plaintiff to testify as to the statement that the chauffeur made to him at the hospital, and in allowing the trial attorney for the plaintiff to discuss the statement in his argument to the jury; that the statement was not part of the res gestae, but was a narration of a past event; and that under the well established rule the statement was, therefore, inadmissible.

We think that the defendant is not in a position to assign error on the ruling of the court for the reason that the record shows that on the trial only a general objection and not a specific objection was made on behalf of the defendant. At the time the testimony was being given, the trial attorney for the defendant said, "I object to that unless the parties were present." The trial attorney for the plaintiff asked, "Unless who was present?" The trial attorney for the defendant then said, "I object, make a general objection."

It is the well established rule that objections to evidence must be made specific. Chicago and Eastern Illinois R. R. Co. v. Wallace, 202 Ill. 129, 132, 133; Illinois Central R. R. Co. v. Wade, 206 Ill. 523, 533. In the case of Stone v. Great Western Oil Co., 41 Ill. 85, the court said (pp. 94, 95.) "It has been so often held by this court that objections to evidence must be specific that it has become the doctrine of this court." It has been explicitly held that objections in such form as "I object" and "defense

objects" are insufficient. Jourdan v. Patterson, 102 Mich. 602, 604; Hutchinson v. Whitmore, 95 Mich. 592, 593; Crabtree v. Vanhoozier, 53 Mo. App. 405, 411. The evidence was not of such a character that it was wholly inadmissible for any purpose whatever. It was competent evidence if the proper parties had been present. The attorney for the defendant should have made his objection in regard to the parties specific when he was questioned in that respect. Instead of doing that he abandoned the objection in reference to the parties and objected generally.

It is further contended by counsel for the defendant that the court erred in permitting the trial attorney for the plaintiff in his argument to the jury to refer to the fact that the chauffeur of the taxicab was under arrest for about two hours after the accident.

The only objection that was made on the trial by the trial attorney for the defendant to this argument was that there was "no evidence to show that for two hours he was kept in the custody of the police officer."

We think that there was evidence on which the argument could be based. Furthermore, as was said in the case of Henry v. The Centralia & Chester R. R. Co., 121 Ill. 264, "It is not to be assumed that every mis-statement of law or of fact will have the effect of exciting improper prejudices. The instructions of the court and the good sense of a competent jury are a sufficient protection against ordinary errors of statement and false arguments of counsel." The record shows that the verdict of the jury was not the result of passion or prejudice, for they answered "No" to a special interrogatory as to whether the taxicab was wantonly and wilfully driven against the plaintiff. Moreover, the amount of the verdict itself negatives the idea of passion or prejudice.

Counsel for the defendant further contend that the verdict is excessive; that the amount of the verdict is "unconscionable." In our opinion the contention is not correct. The only

objects" are inventions. Durham v. Patterson, 102 Miss. 602,
; Dickinson v. Whitmore, 99 Miss. 302; Hamilton v. Tan-
ville, 54 Ala. 414, 416. The evidence was not of such a
character that it was usually introduced in any criminal trial,
was competent evidence if the proper practice had been followed.
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ct. Instead of doing that he abandoned the objection in reference
the particular and objected generally.

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Martinville & Vermilion R. R. Co., 138 La. 564. "It is not to be
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physician who testified in regard to the injuries of the plaintiff was the physician who attended the plaintiff. He testified that he saw her at her home at about 11:30 o'clock the night of the accident; that he found her bruised terribly all over the body and in a state of nervous shock; that she had a laceration of the right knee about half an inch deep, extending to about four inches below the knee: marked contusion about the knee joint, hematoma around the joint, contusions on the right arm and hip, and a deep laceration of the right arm; also a deep laceration of the right thigh, extending to the hip and about three or four inches below it; that she had a fracture of the right rib in the axillary line; that she had a two inch laceration of the chin about half an inch deep; that she was in a hysterical condition; that there was a fracture of the seventh rib on the right side; that ligaments were torn away from the bone on the inner part of the thigh; that the extensor muscles are on the anterior surface of the thigh; that he saw her six or seven times; that she was about sixty-five or seventy years old and that she improved slowly on account of her age; that during this time she was absolutely helpless and in a great deal of pain and discomfort; that she had nurses; that she still has some limp and that it will be permanent; that while he was treating her she had intense pain and would scream if touched.

The plaintiff testified that for a time she walked with crutches and later with a cane; that she suffered pain; that she was taken care of like she was an infant.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

McBurely, P. J., and Matchett, J., concur.

[illegible] are identified in regard to the injuries of the plaintiff
the physician who attended the plaintiff. He testified that
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[illegible] about half an inch deep, extending to about four inches below
[illegible] knee; marked contusion about the knee joint, extending around the
[illegible], ecchymosis on the right arm and hip, and a deep laceration of
[illegible] right ear; also a deep laceration of the right thigh, extending
[illegible] the hip and about three or four inches below it; that she had a
[illegible]ture of the right rib in the axillary line; that she had a two
[illegible] laceration of the skin about half an inch deep; that she was
[illegible] a hysterical condition; that there was a fracture of the seventh
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[illegible] every across it touched.

The plaintiff testified that for a time she walked with
[illegible] and later with a cane; that she suffered pain; that she
[illegible] taken care of like she was an invalid.

For the reasons stated the judgment of the trial court
[illegible] affirmed.

[illegible] ARMSTRONG.

[illegible] J., and Ashcraft, J., concur.

198 - 31330

STEWART E. SEAMAN, Appellant, vs. EAST ST. LOUIS COTTON OIL COMPANY, Appellee.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by Stewart E. Seaman, the plaintiff, to recover from the East St. Louis Cotton Oil Company, the defendant, two bonuses of $10,000 each, which the plaintiff alleges the defendant agreed to pay to the plaintiff for developing a process for a profitable use by the defendant of cotton fibres.

The case was tried before the court without a jury. The court found in favor of the defendant and entered judgment on the finding. From the judgment the plaintiff has prosecuted this appeal.

The plaintiff claims the first bonus under the following written contract:

"EAST ST. LOUIS COTTON OIL CO.,
NATIONAL STOCK YARDS, ILL.

April 15, 1919.

Mr. Stewart E. Seaman,
17 Battery Place,
New York City.

Dear Sir:

Confirming our verbal agreement, we propose to employ your services, effective today, and if necessary until the 1st of July, 1919, at the rate of $750.00 per month. In the event of your work having been completed before that time your services and compensation therefor shall cease.

You are to give us your full time for the investigation of a profitable use for our fibre. Such use to be determined only by the operation of our plant for six months and its continued operation after that time. We are to be the sole judges as to whether any use you may discover and present to us may be sufficiently profitable to start the operation of our plant and in the event of our having operated the plant for six months and continuing to operate it, you are to receive a cash bonus of $10,000 in addition to the salary of $750.00 per month to be

paid you during your research.

We are to reimburse you for any expenses incurred in the said research but any expenditures that may involve an amount in excess of $250.00 must first be referred to us for our approval before such expenditures are made. You are also to be reimbursed for any expenditures for materials, supplies or equipment necessary for investigation.

All data and information which may be the result of your investigation or any patents that may result from it, are to be the exclusive property of the East St. Louis Cotton Oil Company. You are to conduct the investigation in such manner as you may deem best and all data and information which you may obtain is to be of a confidential nature and to be given only to the East St. Louis Cotton Oil Company.

It must be understood that no use could be made of the fibre unless the mill is running to the capacity of at least an output of fifty tons per day.

Yours very truly,
East St. Louis Cotton Oil Co.,
By J. W. Stull,
Vice Pres. & Gen. Mgr.

Accepted by
S. E. Seaman."

The plaintiff claimed the second bonus under an alleged oral contract in which the defendant agreed that if the plaintiff would continue in the defendant's employ after the expiration of the first contract, the defendant would pay the plaintiff an additional cash bonus of $10,000 when the first cash bonus of $10,000 was payable, namely, after the defendant's plant had been in operation for six months and had continued to operate thereafter.

The defendant alleges that the plaintiff did not "in and by his investigation of a profitable use for the fibre manufactured by the defendant, and as a result thereof, discover and present to the defendant a profitable use for such fibre manufactured by the defendant; that the defendant never determined that the plaintiff had discovered and presented to the defendant a profitable use for the fibre manufactured by the defendant by the operation of its plant for six months after the presentation to the defendant of the use for said fibre discovered by the plaintiff or otherwise; that the defendant never operated its said plant for six months after the presentation to the defendant

paid you during your recovery.

We are in reimburse you for any expenses incurred in the said research but any expenditures that may involve an amount in excess of $250, we must first be referred to us for our approval before such expenditures are made. You are also to be reimbursed for any expenditures for materials, supplies or equipment necessary for investigation.

All data and information which may be the result of your investigation or any patents that may result from it, are to be the exclusive property of the Saint St. Louis Cotton Oil Company. You are to conduct the investigation in such manner as you may deem best and all data and information which you may obtain is to be of a confidential nature and is to be given only to the Saint St. Louis Cotton Oil Company.

It must be understood that no use could be made of the filter unless the mill is running to the capacity or at least an output of fifty tons per day.

Yours very truly,

Saint St. Louis Cotton Oil Co.,

By J. W. Smith,

Accepted by Vice Pres. & Gen. Mgr.

W. H. Cannon.

The plaintiff claimed the second bona under an alleged oral contract in which the defendant agreed that if the plaintiff would continue in the defendant's employ after the expiration of the first contract, the defendant would pay the plaintiff an additional cash bonus of $10,000 when the first cash bonus of $10,000 was payable, namely, after the defendant's plant had been in operation for six months and had continued to operate thereafter.

The defendant claims that the plaintiff did not fix and by his investigation of a practicable use for the filter cake produced by the defendant, and as a result thereof, discover and present to the defendant a practicable use for such filter manufactured by the defendant; that the defendant never determined that the plaintiff had discovered and presented to the defendant a practicable use for the filter manufactured by the defendant and the operation of the plant for six months after the presentation to the defendant of the use for such filter discovered by the plaintiff or plaintiffs; that the defendant never operated the said plant for six months after the presentation to the defendant

of the use of said fibre discovered by the plaintiff in and about the utilization of said use, nor did the defendant continue such operation after said six months; that the defendant did not at the expiration of said three months, or at any time, promise the plaintiff that if he would continue in the employ of the defendant at a salary of $750.00 per month, or any other sum, a further bonus of $10,000 would be paid to him, and that the plaintiff did not, in reliance upon and in accordance with any such promise, continue in the employ of the defendant as alleged; that the defendant has paid to the plaintiff all of the salary, compensation, and consideration it agreed to pay him for all his services in said declaration referred to, that were earned by the plaintiff and ever became due to him from the defendant, and that the defendant is not indebted to the plaintiff in any sum whatsoever."

The controlling questions in the case are questions of fact. To state and discuss in detail all the evidence would unduly extend this opinion. There is conflict in the evidence on some of the material issues, but according to our interpretation of the evidence, the preponderance of the evidence clearly establishes the following essential facts: The plaintiff was an expert chemist. The defendant company, which was owned and controlled by Armour & Company, of Chicago, Illinois, and which was located at East St. Louis, Illinois, primarily was a cotton seed oil mill. John Walter Stull was the vice-president and general manager of the defendant company. In the process of extracting oil from cotton seed, it is necessary to remove the cotton fibres that adhere to the cotton seed This is done by means of a machine known as a cotton linter, which removes the lint from the seed by centrifugal force without "breaking or injuring the seed." All of the lint is not removed when the seed is run through the linter machines the first time, and the seed is run through the machine a second time to remove the fibres still

the use of such fibre discovered by the plaintiff in and about
e utilization of such use, nor did the defendant continue such
ervation after such six months; that the defendant did not at
e continuation of said three months, or at any time, promise the
laintiff that if he would continue in the employ of the defendant
a salary of $750.00 per month, or any other sum, a further bonus
$25,000 would be paid to him, and that the plaintiff did not, if
ilence upon and in accordance with any such promise, continue in
e employ of the defendant as alleged; that the defendant has paid
the plaintiff all of the salary, compensation, and consideration
greed to pay him for all his services in said development re-
ered to, that were earned by the plaintiff and ever became due to
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s run through the linter machine the first time, and the seed is
ssed through the machine a second time to remove the fibres which

adhering to the seed. The cotton fibres which are removed when the seed is run through the linter machines the first time are called in the trade first cut linters, and the fibres removed the second time are called second cut linters. These linters were a standard product to an oil mill. There was always a market for them. After the first and second cut linters are removed from the cotton seed, the seed is put through hullers where it is crushed for the purpose of separating the meats contained in the center of the seed from the shell and such adhering cotton fibres as still remain. The separation of the meats from the shell is accomplished by shaking screens through which the meats fall, and on which the shell and fibrous mass collect and then fall off. This fibrous mass is known as cotton hulls. The cotton hulls may then be ground by one of many processes for the purpose of removing still another grade of cotton fibre which is known as cotton hull fibre. This cotton hull fibre is distinguished from the first and second cut linters which are removed from the seed and not from the hull, in that it is usually somewhat shorter and often contains cotton seed shell. Early in the World war the demand for cotton linters in the manufacture of munitions increased to such an extent that there was a shortage of cotton linters, and a large demand arose for cotton hull fibre in the manufacture of munitions. The defendant entered into contracts with munition companies to furnish them with cotton hull fibre. In order to fill these contracts the defendant erected a separate cotton hull fibre plant at East St. Louis, at a cost approximately of half a million dollars. The maximum daily capacity of this plant was from 250 to 300 tons. When the war was over the demand for cotton hull fibre for manufacturing munitions ceased. Prior to prohibition the defendant had sold the hulls to distilleries at Peoria, Illinois, where they were mixed with refuse from the distilleries and used as a feed for cattle. After prohibition went into effect this market for the hulls was closed and there

was no other practicable market for the sale of the hulls. In consequence of the lack of a market for cotton hull fibre and cotton hulls, the cotton hull fibre plant of the defendant was idle, thereby causing a loss to the defendant of about $300 a day. To remedy these conditions the defendant was endeavoring to find a new use for the cotton hull fibre. With this end in view, Stull, the vice-president of the defendant company, consulted the plaintiff. Stull explained the entire situation to the plaintiff and asked the plaintiff if he thought he could find a use to which the cotton hull fibre could be put, so as to afford the defendant a continuous market for the cotton hull fibre. The plaintiff stated that he was confident he could find a use for the cotton hull fibre and suggested the possibility of using it for the manufacture of cellulose acetate, moving picture film, artificial silk, lacquer and paper. The plaintiff was shown through the cotton hull fibre plant of the defendant and also the defendant's oil mill. The cotton hull fibre plant was idle at that time. As he went through the cotton hull fibre plant the plaintiff pulled apart numerous bales and inspected the cotton hull fibre, and from time to time "advanced some of his ideas." Finally the contract of April 15, 1919, heretofore set out, was entered into between the plaintiff and the defendant, and the plaintiff at once began experimenting with the cotton hull fibre with a view to making a successful paper pulp for the manufacture of paper. The defendant had no equipment for making the pulp, and it was the intention of the defendant, if the process proved successful, to build a plant for that purpose. The plaintiff conducted his experiments with a view to making pulp paper out of the cotton hull fibre at the Little Laboratory in Boston, Massachusetts, and the Penobscot Chemical Fibre Company at Great Works, Maine. The defendant shipped cotton hull fibre to the plaintiff at both of these places to be used by the plaintiff in his experiments.

The plaintiff did not use cotton linters in his experiments. After experimenting for some time the plaintiff convinced Stull that he had developed a process for making a pulp out of the cotton hull fibre that could be used successfully for manufacturing paper. The plaintiff was enthusiastic about the process and so was Stull. So enthusiastic was Stull that he agreed to give the plaintiff an additional bonus of $10,000 on the same terms substantially as the first bonus. It was known to both the plaintiff and Stull that other companies, namely, the Southern Oil Company and the American Cotton Oil Company, were making experiments with cotton fibres with a view to using the product in manufacturing paper; and the plaintiff and Stull realized that as a business proposition neither the defendant nor the other companies could conduct an independent business with success. Negotiations therefore were begun between the Southern Cotton Oil Company, the American Cotton Oil Company and the defendant for the purpose of uniting. Neither the Southern Cotton Oil Company nor the American Cotton Oil Company had any cotton hull fibre; they had cotton linters. Furthermore, it was found that the United States Government had a tremendous stock of cotton linters on hand, and that the price of cotton linters had become cheap. According to the testimony of the plaintiff, Haskell, a representative of the Southern Cotton Oil Company, stated that his company had burned up a large amount of their cotton linters rather than to continue to pay insurance on them. In these circumstances the plaintiff and the defendant decided to abandon the plan of experimenting with cotton hull fibre and to join with the other two companies in experimenting with cotton linters. At Hopewell, Virginia, there was a large supply of cotton linters and there was a plant there owned by the Dupont Company which could be rented for experimenting with cotton linters. In this connection the plaintiff testified as follows:

"Remember, the hull fibre does not have to be cut off of the cotton hulls, but cotton linters just be cut off from the cotton seed; so it was a commercial condition that existed at the end of 1919 when we took over the Dupont property, that Mr. Haskell stated -- meant that we would have to switch our raw material from cotton hull fibres to cotton linters and asked at that meeting in Savannah whether I knew if we could cook cotton linters making as satisfactory a product as we had in cooking cotton hull fibre. I told him that I thought we could do so; but what these interests wanted was not an opinion but an exact test."

The combination of the three companies was formed and the plaintiff was sent to Hopewell as agent of the combination. The salary of the plaintiff was advanced by the defendant each month, and the other two companies paid the defendant on the basis of one-third each. Subsequently in March, 1920, the three companies were organized into a company known as the Stamsocott Company. Stull resigned from the defendant company and became the general sales manager of the Stamsocott Company. There was no interruption or change in the management of the business or the operating of the plant when the Stamsocott Company was organized. The business and operation of the plant continued as it had before when the plaintiff was agent of the three companies. The plaintiff remained in the employ of the Stamsocott Company and his salary was increased to $900 a month. By March, 1920, the plaintiff developed a pulp which was considered good enough to be sent to the trade and the Stamsocott Company began the sale of the pulp. The same process exactly was used by the plaintiff when he was agent for the three companies and when he was in the employment of the Stamsocott Company in developing the cotton linters into pulp, as was used in developing the cotton hull fibre into pulp. The Stamsocott Company used some cotton hull fibre as well as cotton linters. The business at Hopewell continued from March, 1919, to June, 1923. In 1921 the plant was shut down for five or seven months. In 1923 it was permanently

"Somehow, the bull fiber does not have to be cut off at the cotton bulls, but cotton linters that be cut off from the cotton seed; so it was a commercial condition that existed at the mill at Lyle when we took over the Bennett property, that is, Bennett wished -- would that we would have to switch our machinery from cotton bull fibers to cotton linters and redid at that meeting in Savannah whether I knew if we could cut cotton linters making an antiseptic by a product as we had in making cotton bull fiber. I told him that I thought we could do so; but what those interests wanted was not an opinion but an exact fact."

The combination of the three companies was formed and the plaintiff was sent to Lynwood to open up the manufacture. The salary of the plaintiff was advanced by the defendant small sum, and the other two companies paid the defendant on the basis of one-third each. Subsequently in Atlanta, the three companies were incorporated into a company known as the Commercial Company. Bill resigned from the defendant company and became the general sales manager of the Commercial Company. There was no stockholders or change in the management of the business or the operating of the plant when the Commercial Company was organized. The business and operation of the plant continued as it did before. The plaintiff was agent of the three companies. The plaintiff remained in the employ of the Commercial Company and the company was incorporated in 1922 a month. By later, 1924, the plaintiff developed a pulp which was manufactured and sold in the form and in the trade and the Commercial company began the sale of the pulp. The same process actually was used by the plaintiff when he was agent for the three companies and when he was in the employment of the Commercial Company in developing the cotton linters into pulp, he was used in developing the cotton bull fiber into pulp. The Commercial Company used some cotton bull fiber as well as cotton linters. The business of Hopewell developed from three, 1917, to June, 1923. In 1923 the plant was not open for five or seven months. In 1922 it was intermittently

closed. The business at Hopewell was not successful. The Stamscott Company lost approximately half a million of dollars. The cotton hull fibre plant of the defendant company at East St. Louis did not operate. It was practically idle.

From the facts which we have stated we are of the opinion that the conclusion necessarily follows that the plaintiff is not entitled to recover.

It is contended by counsel for the plaintiff that the evidence shows that Stull promised the plaintiff that the contract between the plaintiff and the defendant would not be affected by the organization of the new business at Hopewell. We do not think that the preponderance of the evidence establishes that fact. The plaintiff testified to that fact, but Stull denies it. Furthermore, there is evidence tending to render probable the testimony of Stull. On June 21, 1922, the plaintiff wrote a letter to the Stamscott Company demanding payment from that company of a bonus of $10,000. In the letter he said:

> "On March 31, 1919, I made a proposal to Mr. Stull, then vice-president of the East St. Louis Cotton Oil Company. Subsequently this proposal was modified by the East St. Louis Cotton Oil Company to pay me a bonus of $10,000 in cash as and when certain results were obtained. This transaction was then merged into the Stamscott Company, with Mr. Stull's promise that the bonus would remain in force with the merger."

The plaintiff further stated in the letter, "the bonus has been due and payable to me since January 1st, 1921. Under the circumstances I am submitting herewith formal request for the payment of $10,000 in cash with interest from January 1st, 1921."

From this letter it is clear that the plaintiff is not relying on the contract of April 15, 1919, with the defendant company, but considers that contract as having been merged into the Stamscott Company. He is holding liable only the Stamscott Company. But the present action is against the East St. Louis

Cotton Oil Company. Furthermore, the plaintiff is demanding payment from the Stamscott Company of only one bonus, apparently having abandoned all claim for the second bonus. In this connection both Chandler, president of the defendant company, and Keogh, attorney for Armour and Company, testified that in conversation with them the plaintiff claimed only one bonus. If the contract with the defendant was merged into the Stamscott Company, as the plaintiff himself says it was, then Stull's promise, if of any legal effect at all, would be binding only on the Stamscott Company, which is not a defendant in the present action. Since the Stamscott Company, however, was composed of two other companies besides the defendant company, it is highly improbable that Stull would attempt to bind the Stamscott Company in the matter of the plaintiff's bonus by a mere informal oral promise to the plaintiff. Moreover, since the plaintiff is claiming two bonuses in the present action, it is difficult to understand why, in his letter from which we have quoted, he refers to Stull's promise as to one bonus only. In any event the plaintiff should have explained why, according to his letter, he accepted without protest Stull's promise as to one bonus only and did not insist that Stull should include in the promise the other bonus also. The inconsistent position in which the plaintiff places himself by his own letter renders improbable the statement in the letter that Stull promised that "the bonus would remain in force with the merger."

Counsel for the plaintiff further contend that the operation of the plant at Hopewell by the three companies for which the plaintiff was acting as agent, and also the operation by the Stamscott Company, was the operation of the plant contemplated by the written contract of April 15, 1919, between the plaintiff and the defendant company.

In support of this contention counsel for the plaintiff argue that the term "fibre" as used in the contract was used

in its generic sense and included both cotton linters and cotton hull fibre; that the words "plant" and "mill," as used in the contract, meant a plant or mill wherever the defendant might operate it, whether erected, whether to be erected, or whether rented from others; that at the time the contract was executed the defendant had no pulp plant at East St. Louis, and that both the plaintiff and the defendant contemplated that this plant should be located where it could be most cheaply operated; that the plant at Hopewell was operated in the manufacture of paper pulp discovered by the plaintiff; that "it would be an unheard of thing if the law could be held to be that a contract could be nullified by the mere device of one party taking in a partner or incorporating in business."

In our opinion a complete answer to all of these contentions of counsel for the plaintiff is that the evidence shows conclusively that the written contract of April 15, 1919, was mutually abandoned by the plaintiff and the defendant, and that the plant at Hopewell, which was operated by the three combined companies, was an entirely new enterprise which was not contemplated at the time that the contract was executed. We have heretofore stated the reasons shown by the evidence why the contract was abandoned, and it is not necessary to repeat that evidence. That the plaintiff agreed to the abandonment of the contract is shown clearly by our statement of the evidence. Furthermore, the fact that subsequently, at the time that the plaintiff severed his connection with the Stamscott Company he recognized that the contract had been abandoned, has been shown by the letter from which we have quoted, wherein the plaintiff expressly says that the contract was "merged into the Stamscott Company," and makes a demand for payment of "the" bonus by that company alone and not by the defendant.

We do not concede, however, that the term "fibre" as used in the contract, included cotton linters, nor that the words "plant" and "mill" meant any plant that the defendant might operate. On the contrary, we are of the opinion that it clearly appears from the evidence that the fibre contemplated by the contract was cotton hull fibre and not cotton linters; and that the plant or mill intended was the defendant's cotton hull fibre plant at East St. Louis which had been erected at a cost approximately of $500,000 and which was idle after the war because of the fact that the defendant could not find a profitable use for cotton hull fibre.

We do not think that on the facts in the case at bar counsel for the plaintiff are justified in contending that the defendant has attempted to nullify the contract by the "device" of "taking in a partner or incorporating the business." In our opinion the evidence clearly establishes the fact that the plaintiff and the defendant by mutual agreement abandoned the contract of April 15, 1919, and that the defendant entered into a new and different enterprise with two other companies.

In the view that we have taken of the case, it will not be necessary to consider the contentions of counsel for the plaintiff relating to the propositions of law. It also follows from the conclusions that we have expressed, that it is unnecessary to determine the question whether the plaintiff succeeded in developing a process for using profitably cotton hull fibre. Assuming for the sake of argument that he did, the process was not used by the defendant as contemplated by the written contract of April 15, 1919, between the plaintiff and the defendant, but that contract was mutually abandoned and the new enterprise at Hopewell was entered into.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

260 - 31392

T. B. CRAWFORD MILLINERY COMPANY, a corporation,
Appellee,

v.

S. J. BRASH, trading as BRASH TRIMMED HAT COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by S. J. Brash, trading as Brash Trimmed Hat Company, the defendant, from a judgment against the defendant in the sum of $110.50 in an action brought by the T. B. Crawford Millinery Company, the plaintiff, to recover the price of horse hair braid alleged to have been sold by the plaintiff to the defendant.

The case was tried before the court without a jury.

The defendant contends that he never purchased the braid; that it was left with him on approval; that he never accepted it; that it did not work up as agreed; and that it was not of good quality.

The only grounds on which the defendant asks for a reversal of the judgment are (1) that the finding of the court is manifestly against the weight of the evidence; and (2) that the judgment on its face is for a larger amount than is shown by the evidence.

The substance of the evidence on behalf of the plaintiff company is that the defendant called up the plaintiff company by telephone and asked whether the company had any hair braid, tinsel edge, of the kind in question; that he,

defendant, was told that it had; that the defendant said he would like to see some samples; that samples were taken to his place of business; that he selected one piece of braid and said he would try it out; that two or three days later he wanted to know how much braid the company had of certain colors; that he was told; that he said "all right I will take them;" that the braid was delivered to him; that he signed a receipt for it and that the bill for it was left with him.

On behalf of the defendant the evidence is that the plaintiff company called up the defendant and asked him if he could use some braid below cost; that the defendant said "bring it around and let us try it out;" that when a sample was brought to him he said "it does not look right to me; I will have one of my girls try it out. You come in in a day or two and I will let you know;" that the braid was delivered "on memorandum" and that the defendant was told to use whatever he could and to return the balance; that the braid was tried out and could not be used; that it was imperfect, "rotted somewhere," "ruffled up in the machine," and was "ragged;" that about ten days after the braid had been delivered the defendant notified the plaintiff company by letter that the defendant could not use the braid and asked the plaintiff company to call for the braid.

In this state of the evidence, we would not be justified in disturbing the finding of the court. The court saw and heard the witnesses testify and on the conflicting testimony decided in favor of the plaintiff. We think that the finding of the co rt is not manifestly against the weight of the evidence.

In regard to the contention of the defendant that there

is a variance of 25 cents between the judgment of the court and the evidence, we are of the opinion that the maxim de minimis non curat lex is applicable.

For the reasons stated the judgment is affirmed.

AFFIRMED.

McCurely, P. J., and Hatchett, J., concur.

276 - 31408

WILLIAM E. ROSS, Appellee, v. MARY E. KENNEY, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by William E. Ross, the plaintiff, to recover from Mary E. Kenney, the defendant, $200 which, in a real estate transaction between the plaintiff and the defendant, the plaintiff deposited as earnest money with Tomas P. Dowd, the agent of the defendant.

The case was tried before the court without a jury. The court found in favor of the plaintiff and entered judgment on the finding. From the judgment the defendant has prosecuted this appeal.

There is no dispute about the material facts. The plaintiff and the defendant entered into a written contract in regard to the purchase by the plaintiff of a brick residence owned by the defendant. The plaintiff deposited with Thomas P. Dowd, the agent of the defendant $200, as earnest money. By the terms of the contract the defendant agreed to convey to the plaintiff by a "statutory general warranty deed" a good and merchantable title to the property subject, among other encumbrances, to "any party wall agreement of record." It was further provided in the contract that in case material defects should be found in the title and should be reported in writing by the plaintiff, if the defects were not cured within 60 days after

the notice, the contract, at the option of the plaintiff, should become null and the earnest money should be returned. The contract further provided that if the plaintiff should fail to perform the contract promptly on his part, the earnest money should at the option of the defendant be retained as liquidated damages and the contract should become null and void. The contract further provided that a certificate of title issued by the registrar of Titles of Cook County or complete merchantable abstract of the title or merchantable copy, brought down to date, or "merchantable title guaranty policy" made by the Chicago Title and Trust Company should be furnished by the defendant within a reasonable time.

The evidence shows that the defendant procured a guaranty policy from the Chicago Title and Trust Company. There was no evidence of any party wall agreement of record. It is conceded by the defendant "that as designed and constructed the entire building covers six or seven lots with a separate two story residence on each lot; that the residences are brick with a stone front, having separate entrances with separate steps leading to each entrance." The plaintiff inspected the property before the contract was signed and found the condition that existed. He testified that there were six "separate buildings all embedded in one;" that there was "just one roof covering all the buildings;" that "there is nothing to show that they are separate buildings."

The plaintiff notified the defendant, in accordance with the provisions of the contract between the plaintiff and the defendant, that the defendant was unable to convey a title "free and clear from all liens, incumbrances, restrictions and

easements" and demanded the return of the $200 earnest money. The defendant did not cure the defect.in the title, as requested by the plaintiff. Subsequently the defendant sold the property to another party.

It is conceded by the defendant that the property was burdened with an easement not of record. But the defendant contends "that a statutory deed does not warrant against such an easement as is objected to in this case;" and further contends "that the plaintiff was presented with the guaranty policy as agreed upon in the contract of purchase, that all liens and encumbrances were mentioned in said contract; that easements were not specifically mentioned, but were contemplated in law;" that "the contract was signed after inspection of the property and if there were any easements they were open, apparent, and obvious and by law were taken fully into consideration by all the parties; that "they were part of the contract which provided for a warranty deed without mentioning liens, encumbrances, restrictions or easements."

The plaintiff contends that "it was not provided in the contract that the plaintiff take title subject to this defect;" that the "defendant had full knowledge of the defects in her title, and signed a contract to convey a clear title except party-wall agreements of record;" that "she should have seen to it that there were party-wall agreements of record, or else should not have contracted to give a title free of such easements and restrictions, knowing that she could not make the title contracted for."

We agree with the contentions of the plaintiff.

Section 9 of chapter 30 of the Illinois Statutes,

[illegible]nments" and demanded the return of the $500 earnest money. [illegible] defendant did not cure the defect in the title, as required [illegible] the plaintiff. Subsequently the defendant sold the property [illegible] another party.

It is conceded by the defendant that the property [illegible] burdened with an easement not of record. But the defendant [illegible] "that a statutory deed does not warrant against such [illegible] easement as is objected to in this case;" and further con- [illegible] "that the plaintiff was presented with the guaranty [illegible]lity as agreed upon in the contract of purchase, that all [illegible]ions and encumbrances were mentioned in said contract; that [illegible]ements were not specifically mentioned, but were contemplated [illegible] law;" that "the contract was signed after inspection of the [illegible] property and if there were any encumbrances they were open, apparent, [illegible] obvious and by law were taken fully into consideration by all [illegible] parties; that "they were part of the contract which provided [illegible] a warranty deed without mentioning liens, encumbrances, re- [illegible]strictions or easements."

The plaintiff contends that "it was not provided in the [illegible] contract that the plaintiff take title subject to this defect;" [illegible] the "defendant had full knowledge of the defects in her [illegible]title, and signed a contract to convey a clear title except [illegible]rty-wall agreements of record;" that "she should have been so [illegible] that there were party-wall agreements of record, or else she should [illegible] have contracted to give a title free of such easements and [illegible]restrictions, knowing that she could not make the title contracted [illegible]r."

We agree with the contentions of the plaintiff.

Section 9 of chapter 30 of the Illinois Statutes,

relating to Conveyances, provides that a warranty deed shall be deemed and held a conveyance with the covenant that the premises are "free from all encumbrances."

The principal question then to be determined in the case at bar is whether the easement in controversy was an encumbrance within the meaning of the statute. The rule in the state of Illinois is that a right to an easement of any kind in land is an encumbrance. Beach v. Miller, 51 Ill. 206, 210; Weiss v. Binnian, 176 Ill. 241, 247. In the case of Weiss v. Binnian, supra, it was explicitly held (p. 246) that "while it may be the rule in some of the states that a grantor's conveyance of warranty in a deed does not include an easement, this court has adopted a different rule in Beach v. Miller, 51 Ill. 206."

We think that it does not follow, as counsel for the defendant contend, that because the plaintiff signed the contract after an inspection of the property and with knowledge of the easement which was open and apparent, the easement was "taken into consideration by all of the parties;" and was "part of the contract which provided for a warranty deed without mentioning liens, encumbrances, restrictions or easements." The plaintiff did not waive the right to object that there was an easement on the property by signing the contract with knowledge of the existence of the easement, for the reason that by the terms of the contract itself the defendant agreed to give the plaintiff a warranty deed; and according to the authorities which we have just cited above a warranty deed includes an easement and an easement is an encumbrance.

Counsel for the defendant further contend that the court erred in entering judgment against the defendant; that

[illegible] to conveyance, provides that a warranty deed shall [illegible] deemed and held a conveyance with the covenant that the [illegible] grantor was "free from all encumbrances."

The pertinent question then is to be determined in the [illegible] as it has in whether the assument in controversy was an [illegible] encumbrance within the meaning of the statute. The rule in the [illegible] state of Illinois is that a right to an assument of any kind is [illegible] and is an encumbrance. Ehrmann v. Miller, 84 Ill. App. 329; [illegible] v. Blanchard, 170 Ill. 341, 347. In the case of Kahn v. [illegible], supra, it was explicitly held (p. 344) that "while it [illegible] be the rule in some of the states that a grantee's covenant [illegible] of warranty in a deed does not include an assument, this [illegible] court has adopted a different rule in Ehrmann v. Miller, 84 Ill. [illegible]."

We think that it does not follow, as counsel for the [illegible] assument, that because the plaintiff signed the con- [illegible] after an inspection of the property and with knowledge [illegible] the assument which was open and apparent, the assument was [illegible] into consideration by all of the parties; and was "part [illegible] the contract which provided for a warranty deed without [illegible] including liens, encumbrances, restrictions or easements." The [illegible] did not waive the right to expect that there was no [illegible] assument on the property by signing the contract with knowledge [illegible] the existence of the assument. For the reason that by the [illegible] of the contract itself the defendant agreed to give the [illegible] a warranty deed; and according to the authorities which [illegible] just cited above a warranty deed includes an assument [illegible] an assument is an encumbrance.

Counsel for the defendant further contend that the [illegible] error in entering judgment against the defendant; that

[illegible]

if the plaintiff was entitled to recover, the judgment should have been entered against Dowd. Since the evidence shows that Dowd held the $200 earnest money as agent for the defendant, the judgment properly was entered against the defendant. Fishback v. Brown, 16 Ill. 74, 75; Murphy v. The People, 104 Ill. 528, 535.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

288 - 31420

ROXANA PETROLEUM CORPORATION, a Corporation, Appellee, vs. ANTHONY PRILLO, Appellant.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Anthony Prillo, the defendant, from a judgment entered under section 55 of the Practice act, in favor of the Roxana Petroleum Corporation, the plaintiff, in the sum of $9491.70, which was part of the amount claimed by the plaintiff. As to the balance of the plaintiff's claim, the court ordered that it "stand for trial in due course."

The case was tried before the court without a jury.

The demand of the plaintiff was for $9491.70, the price of gas and kerosene sold and delivered to the defendant; also for $90.84 for labor and material furnished in the installation of a pump at a filling station of the defendant; also for $770.82 which included the cost of installing certain equipment at one of the filling stations of the defendant, and the cost of removal of this equipment from the filling station.

The principal questions in the case relate to the rulings of the court on the pleadings. To the plaintiff's declaration and affidavit of claim the defendant filed the plea of the general issue with an affidavit of merits and a plea of set-off. By leave of court the defendant amended his plea of general issue with affidavit of merits twice, and his plea of set-off once. To the defendant's amended plea of set-off the plaintiff filed a general and special demurrer. The court sustained the plaintiff's

demurrer. Thereupon the defendant moved for leave to amend his amended plea of set-off. The court allowed the defendant's motion and gave the defendant ten days within which to file a second amended plea of set-off. The defendant, however, did not file a second amended plea of set-off, but at a succeeding term of court elected to stand by his first amended plea of set-off. The plaintiff moved to strike from the files the last paragraph of the affidavit of merits to the defendant's second amended plea of the general issue; and further moved under section 56 of the Practice act that a judgment be entered against the defendant on the plaintiff's declaration with affidavit of claim in the sum of $9491.70 with interest at five per cent from September 14, 1925. The court ordered that the last paragraph of the affidavit of merits to the defendant's second amended plea of the general issue be stricken from the files, and that judgment be entered in favor of the plaintiff in the sum of $9491.70. The court did not allow interest.

In his pleadings the defendant did not deny that he was indebted to the plaintiff in the sum of $9491.70. In his affidavit of merits attached to the second amended plea of the general issue, the defendant alleged separate defenses to two items of the plaintiff's claim; but as to the item of $9491.70 the defendant merely referred to his amended plea of set-off as stating a defense to that item. As the demurrer of the plaintiff to the defendant's amended plea of set-off had been sustained, there was, therefore, at the time that the judgment was entered, nothing in the record to show any defense to the item of $9491.70. In fact the defendant's amended plea of set-off offers to "allow to the plaintiff $9491.70 of said damages."

The first contention of counsel for the defendant is that the court erred in sustaining the plaintiff's demurrer to the defendant's amended plea of set-off.

demurrer. Thereupon the defendant moved for leave to amend his amended plea of set-off. The court allowed the defendant's motion and gave the defendant ten days within which to file a second amended plea of set-off. The defendant, however, did not file a second amended plea of set-off, but at a succeeding term of court elected to stand by his first amended plea of set-off. The plaintiff moved to strike from the files the last paragraph of the affidavit of merits to the defendant's second amended plea of the general issue; and further moved under section 88 of the Practice Act that a judgment be entered against the defendant on the plaintiff's demurrer with affidavit of claim in the sum of $9491.70 with interest at fifty per cent from December 14, 1928. The court ordered that the last paragraph of the affidavit of merits to the defendant's second amended plea of the general issue be stricken from the files, and that judgment be entered in favor of the plaintiff in the sum of $9491.70. The court did not allow interest.

In his pleadings the defendant did not deny that he was indebted to the plaintiff in the sum of $9491.70. In his affidavit of merits attached to the second amended plea of the general issue, the defendant alleged separate defenses to two items of the plaintiff's claim; but as to the item of $9491.70 the defendant merely referred to his amended plea of set-off as stating a defense to that item. At the character of the plaintiff to the defendant's amended plea of set-off had been sustained, there was, therefore, at the time that the judgment was entered, nothing in the record to show any defense to the item of $9491.70. In fact the defendant's amended plea of set-off alleges to "allow to the plaintiff $9491.70 of said the same."

The first contention of counsel for the defendant is that the court erred in sustaining the plaintiff's demurrer to the defendant's amended plea of set-off.

In our opinion the defendant is not in a position to raise this question, for the reason that he abandoned his first amended plea of set-off by moving for leave to file a second amended plea of set-off when the plaintiff's demurrer was sustained to the first amended plea of set-off. It is the rule that where a party acquiesces in the ruling of the court in sustaining a demurrer to his pleas and takes leave to plead over, no question can arise on appeal as to the sufficiency of such pleas. Dunlap v. Chicago, Milwaukee & St. Paul Ry. Co., 151 Ill. 409, 421; Doyle v. City of Sycamore, 193 Ill. 501, 502. To the same effect in principle are the following cases: Dalton v. Chicago City Ry. Co., 93 Ill. App. 7, 8; Harris v. Willis, 209 Ill. App. 402. The election of the defendant at the subsequent term to abide by his amended plea of set-off did not change the situation as at that time the order allowing him, on his motion, to plead over after the plaintiff's demurrer had been sustained, had not been set aside, but was still in effect. The record shows the defendant in the attitude of assuming directly inconsistent positions.

We have examined the defendant's amended plea of set-off, however, and we are of the opinion that it is defective in that it seeks to set off unliquidated damages arising from alleged breaches of contracts other than the contract on which the plaintiff has sued. It is the rule that unliquidated damages growing out of an alleged breach of contract, distinct from the contract sued upon and in no wise connected therewith, cannot be made the subject of a set-off. Higbie v. Rust, 211 Ill. 333, 338. Counsel for the defendant maintain that the amended plea of set-off states facts which "show a good defense at least by way of recoupment under the general issue." The rule we just cited applies as well to recoupment as to set-off. 34 Cyclopedia of Law and Procedure, p. 695. Furthermore, there is one item of damage in the plea that could be recovered by the defendant only in an action of tort, and that is the item of $800

In our opinion the defendant is not in a position to raise this question, for the reason that he abandoned his "first" amended plan of set-off by moving for leave to file a second amended plan of set-off when the plaintiff's demurrer was sustained to the first amended plan of set-off. It is the rule that where a party acquiesces in the ruling of the court in sustaining a demurrer to his plead and takes leave to plead over, no question can arise on appeal as to the sufficiency of such plead. Dunlap v. Williams, 111 Ga. 6 (1). Pope v. Ga. R. R., 121 Ga. 409, 422; Dodd v. City of Cuthbert, 127 Ga. 603, 608. To the same effect in principle are the following cases: Dalton v. Dalton Ry. & L. Co., 93 Ga. 493, 497; Ellis v. Ellis, 109 Ga. 488, 490. The objection of the defendant in the present case is that by his second plan of set-off he did not change the situation so as that the order effecting this, on his motion, to plead over after the plaintiff's demurrer had been sustained, had not been not notice, but was still in effect. The record shows the defendant in the attitude of assuming directly inconsistent positions.

We have examined the defendant's amended plan of set-off, however, and we are of the opinion that it is defective in that it tends to set off multifarious damages arising from alleged breaches of a contract other than the contract on which the plaintiff has sued. If it was the rule that multifarious damages growing out of an alleged breach of contract, distinct from the contract sued upon and in no wise connected therewith, cannot be made the subject of a set-off, Clarke v. Ford, 81 Ga. 329, 332, Counsel for the defendant maintain that the amended plan of set-off where there with it "show a good defense at least by way of recoupment under the general issue." The rule is that plead opposition as well to recoupment as to set-off. 24 Cyclopedia of Law and Procedure, p. 828. Furthermore, there is one item of damage in the plan that could be recovered by the defendant only in an action of tort, and that is the item of $800

"For repairing the damages done to defendant's wire, cement and improvements caused by tearing out equipment" by plaintiff. In the case of Robinson v. Hibbs, 48 Ill. 408, the court said (p. 409): "We are aware of no law which authorizes the unliquidated damages growing out of a tort to be set off in an action ex contractu." Moreover, the defendant fails to allege that the item of $800 for repairs was the reasonable, customary cost for making the repairs.

Counsel for the defendant further contend that the court erred in striking from the files the last paragraph of the defendant's affidavit of merits to the second amended plea of the general issue.

As the defendant has not filed a bill of exceptions, this question properly should not be reviewed by this court.

It is the rule that in order to preserve for review the question of the correctness of the ruling of the court in striking a pleading from the files, the pleading itself must be incorporated in a bill of exceptions, Illinois Surety Co. v. Munro, 209 Ill. App. 407, 411. However, we have examined the ruling of the court and we think that the ruling was correct. The paragraph itself contained no defense to the plaintiff's claim. It merely referred to the defendant's amended plea of set-off as follows:

> "Affiant further states that as to the balance of plaintiff's said demand the nature of the defense of the defendant is a set-off of damages suffered by the defendant by reason of breaches by the plaintiff of certain contract, which said contracts, breaches and damages are connected with the plaintiff's said demand; and all of which said contracts, breaches and damages are set up in defendant's amended set-off heretofore filed herein."

As the defendant's amended plea of set-off had been held by the court to be defective on the plaintiff's general and special demurrer, and as we are of the opinion that the court's ruling in that respect was correct, it follows that the court properly struck from the files the last paragraph of the amended plea of set-off.

Counsel for the defendant further contend that the court erred in entering judgment in favor of the plaintiff in the sum of $9491.70, and in ordering that "the balance of the plaintiff's claim stand for trial in due course."

We think that in view of the state of the record the court properly entered the judgment under section 55 of the Practice act. At the time that the judgment was entered, according to the rulings of the court, which in our opinion were correct, there was nothing in the record to show that the defendant denied the indebtedness of the item of $9491.70. On the contrary, the defendant, in his amended plea of set-off, offered "to set off and allow to the plaintiff $9491.70 of said damages."

Counsel for the plaintiff have assigned as cross error the refusal of the court to include in the judgment interest in the sum of $304.49. It is the contention of counsel for the plaintiff that interest should have been allowed under section 2 of chapter 74 of the Illinois Statutes relating to Interest. We are of the opinion that the plaintiff is not entitled to interest.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

390 - 31522

MEYER GREEN and BESSIE GREEN, Appellees, vs. CHICAGO FIRE AND MARINE INSURANCE COMPANY OF CHICAGO, ILLINOIS, a Corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Chicago Fire and Marine Insurance Company of Chicago, Illinois, the defendant, from a judgment in the sum of $152.95 in favor of Meyer Green and Bessie Green, the plaintiffs, in an action brought by the plaintiffs to recover damages for a loss by an alleged fire under a fire insurance policy issued by the defendant to the plaintiffs.

The case was tried before the court without a jury.

No brief has been filed on this appeal on behalf of the plaintiffs.

The alleged fire originated in the electrical equipment in the building owned by the plaintiffs.

In their statement of claim the plaintiffs claimed a total damage of $192.95, of which $152.95 was for labor and material in replacing electrical apparatus, and $40 for plastering and calcimining. As the court allowed damages in the sum of $152.95 only, it is evident that such damages were intended to cover the cost of replacing electrical apparatus.

The principal question in the case relates to the construction of the following clause of the policy:

> "This Company shall not be liable for any loss or damage resulting from any electrical injury or disturbance, whether from artificial or natural cause, in or to any of the electrical apparatus, machinery or connections, hereby insured unless fire ensues, and then for loss resulting from fire only. *** "

[illegible] CLEMM and MARGIE CLEMMM, Appellees,	
vs.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
[illegible] FIRE AND MARINE INSURANCE COMPANY OF CHICAGO, ILLINOIS, a corporation, Appellant.	

[illegible]

This is an appeal by the Chicago Fire and Marine Insurance Company of Chicago, Illinois, the defendant, from a judgment in the sum of $[illegible].00 in favor of Joyce Clemm and Margie Clemm, the plaintiffs, in an action brought by the plaintiffs to recover damages for a loss by an alleged fire under a fire insurance policy issued by the defendant to the plaintiffs.

The case was tried before the court without a jury.

No brief has been filed in this appeal on behalf of the plaintiffs.

The alleged fire originated in the electrical equipment in the building owned by the plaintiffs.

In their statement of claim the plaintiffs claimed a total damage of $[illegible], of which $[illegible].00 was for labor and material in replacing electrical apparatus, and $60 for plastering and painting. As the court allowed damages in the sum of $[illegible] only, it is evident that such damages were intended to cover the cost of replacing electrical apparatus.

The pertinent question in the case relates to the construction of the following clause of the policy:

"This company shall not be liable for any loss or damage resulting from any electrical injury or disturbance, whether from artificial or natural causes, nor to any of the electrical appliances, machinery or accessories, merely insured against fire unless, and then for loss resulting from fire only. ***

It is the contention of counsel for the defendant that the evidence does not show that there was a fire within the meaning of the clause in question; that "there was no proof of any actual ignition in this case outside of the electrical equipment, except a flame at the board to which the meter was attached, and there was no proof of any damage resulting from that flame."

In our opinion, according to a fair construction of the clause in question, if there was a fire in the electrical equipment within the ordinary meaning of the word fire, and the electrical equipment was damaged by such fire, the defendant would be liable for such damage. This is the construction which we think is implied by the following language in the brief of counsel for the defendant: "In the case at bar, the plaintiffs' recovery is based on loss resulting to the electrical equipment in the building insured, but such loss was caused by electrical injury or disturbance, and not by fire, and the policy sued on specifically exempts the insurer from liability in such case."

The precise question to be determined therefore is, whether the evidence shows that there was a fire. The definition of the word fire applicable to the present case, as given by Webster's New International Dictionary, is as follows: "The principle of combustion as manifested by light especially flame, and in heating, destroying and altering effects." The definition of the Century Dictionary is as follows: "Combustion, or the heat and light evolved during the process of combustion."

The substance of the evidence on behalf of the plaintiffs is that there was a "big flame" about 2½ feet in the electric light meter; that the meter was in a metal box; that there was a piece of board burned; that the boards outside the meter box were ruined; that the side walls were burned; that the fire "started burning the floor;" that "the house was full of smoke;" that there

It is the contention of counsel for the defendant that the evidence does not show that there was a fire within the meaning of the clause in question; that "there was no proof of any actual ignition in this case except of the electrical equipment, except a flame at the point in which the meter was attached, and there was no proof of any damage resulting from that flame."

In our opinion, according to a fair construction of the clause in question, if there was a fire in the electrical equipment within the ordinary meaning of the word fire, and the electrical equipment was damaged by such fire, the defendant would be liable for such damage. This is the construction which we think is implied by the following language in the brief of counsel for the defendant: "In the case at bar, the plaintiffs' recovery is based on loss resulting to the electrical equipment in the building insured, but such loss was caused by electrical injury or disturbance, and not by fire, and the policy sued on specifically excludes the insurer from liability in such case."

The precise question to be determined therefore is, whether the evidence does show that there was a fire. The definition of the word fire applicable to the present case, as given by Webster's New International Dictionary, is as follows: "The principle of combustion as manifested by light especially flame, and in burning, destroying and altering effects." The definition of the Century Dictionary is as follows: "Combustion, or the heat and light evolved during the process of combustion."

The substance of the evidence on behalf of the plaintiffs is that there was a "big flame" about 8½ feet in the electric light meter; that the meter was in a metal box; that there was a piece of board burned; that the boards outside the meter box were burned; that the wires were burned; that the "varnish burning the floor;" that "the house was full of smoke;" that there

was a fire "on the wall where the meters were placed, where the wood was burned all around the box also - outside of the box;" that "it was burned black;" that "it was burned like ashes;" that the fire was extinguished by the janitor by water with a hose; that the firemen came after the fire was put out.

On behalf of the defendant the substance of the evidence, which consists of the testimony of agents of the defendant who examined the premises after the fire, is that on the west wall of the basement a switch box or fuse box "had evidently been shorted;" that the wiring was all melted and burned around the fuse box; that there was "no board scorched by a flame, no charred wood;" that "the damage was caused by a short circuit in the electric wiring;" that all the wiring inside the metal box was charred; that the insulation was charred and the lead which makes various connections to the various parts inside was melted and had dropped down to the bottom of the box.

According to our interpretation of the evidence there is ample evidence to sustain a finding of the court that there was a fire within the meaning of the word fire, as defined in the definitions which we have cited above. In this view of the evidence it follows that the defendant is liable for the damage to the plaintiffs' property.

Counsel for the defendant further contend that the judgment should be reversed for the reason that the insurance policy provides "that loss or damage if any should be payable to the Chicago Title and Trust Company as trustee, as its interest might appear, and the Chicago Title and Trust Company was not made a party to the suit."

This objection was not raised by the defendant in the court below, either by its pleadings or otherwise.

The answer to this contention, however, is that the

assignment of errors does not contain the objection.

Counsel for the defendant further contend that the court committed reversible error in over-ruling the "defendant's motion for a more specific statement of claim, at which time the defendant requested a copy of the policy sued upon be made a part of plaintiffs' statement of claim, same being the instrument sued upon."

We do not think that there is any merit in the contention.

The policy of insurance is in evidence; and the defendant has not shown that it has been injured in any way by the ruling of the court.

For the reasons stated the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

431 - 31563

MRS. J. CERMES, Appellee, vs. CENTRAL FURNITURE PACKING COMPANY, a Corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Central Furniture Packing Company, the defendant, from a judgment in favor of Mrs. J. Cermes, the plaintiff, in the sum of $265 in an action brought by the plaintiff to recover damages for the loss by fire of furniture delivered by the plaintiff to the defendant for storage and safe keeping.

The case was tried before the court without a jury.

No brief has been filed on behalf of the plaintiff on this appeal.

On the trial of the case no evidence was offered by the plaintiff to show that the fire was caused by the negligence of the defendant. The only evidence on behalf of the plaintiff in respect of the cause of the fire was the testimony of the plaintiff that she did not think that the defendant knew the cause of the fire. The evidence on behalf of the defendant tends to show that the fire was not caused by the negligence of the defendant.

The rule is well established that when the proof shows that goods in the hands of a bailee have been destroyed by fire the bailee will not be presumed to have been negligent, but the burden of proof is on the plaintiff to show that the bailee was guilty of negligence. A. G. Becken Co. v. Ottawa Pianophone Co., 217 Ill. App. 49, 53; Nichols v. Union Stock Yards and Transit Co., 193 Ill. App. 14, 18, 19; Bryan v. Chicago & Alton R. R. Co., 169 Ill.

App. 181, 183, 184; Standard Brewery v. Hales & Curtis Malting Co., 70 Ill. App. 363, 367.

It is also the rule that there is no legal duty imposed on a bailee to insure goods or chattels for the benefit of the owner unless there is a contract to do so or a custom existing that requires it. Parker v. Dietz, 203 Ill. App. 120, 123.

In the case at bar there is no evidence of such a contract or custom.

For the reasons stated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

143 - 31273

DANIEL O'DOHERTY, Appellee, vs. CITY OF CHICAGO, a Municipal Corporation, WILLIAM E. DEVER, Mayor of the City of Chicago, and MORGAN A. COLLINS, Chief of Police Department of the City of Chicago, Appellants.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendants, City of Chicago, its Mayor, and Chief of the Police department of the City, appeal from a decree by which they were permanently enjoined "from illegally interfering with Daniel O'Doherty, complainant, in any way, shape, manner or form, or disturbing, trespassing, molesting, harassing or interfering with the peaceful enjoyment, possession, use and operation of his business as a real estate broker, at 752 East Pershing Road, in the City of Chicago, County of Cook and State of Illinois, or from unlawfully threatening to arrest, or arresting any of the employees and patrons, while meeting together in peaceable and lawful assembly or from unlawfully seizing and searching the person of complainant, or depriving him of his liberty without due process of law, and from searching the persons of the complainant and others on said premises, when engaged in lawful occupations, or from searching the premises, without warrant of law or authority, but nothing herein contained shall restrain the Police Officers of the City of Chicago or any other law enforcing officer from entering the said premises in a lawful manner and in the proper and lawful exercise of the police power, or from entering said premises for the purpose of executing civil or criminal process."

The cause was heard by the chancellor upon testimony

taken in open court. The proof tended to show that the complainant, Daniel O'Doherty, was the lessee of certain premises situated in the City of Chicago, Cook County, Illinois, known and described as No. 752-54 East Pershing Road, holding the same under a written lease dated April 10, 1925, for a term commencing May 1, 1925, and expiring on April 30, 1927. The written lease provided that the premises should be occupied for cigar store and soft drink parlor.

On April 23, 1925, complainant, O'Doherty, subleased that part of the premises known as No. 754 to John Lytton, the sublease providing that the lessee should occupy the premises as a store-room for the sale of soft drinks only. It appears that Nos. 752 and 754 were at one time connected at the rear by means of a door, which has since been closed up by a solid brick wall. The premises known as No. 754 were twice raided by the police, fifty men having been taken out on October 6, 1923, and thirty-one, including complainant, O'Doherty, were on another occasion in 1923 charged with gambling.

On January 2, 1926, complainant obtained a real estate broker's license from the State of Illinois, and on January 8, 1926, a similar license from the City of Chicago.

On October 29, 1925, the Chief of Police received written notice from Henry Barrett Chamberlin, operating director of the Chicago Crime Commission, to the effect that complaint had been made to the office of the Commission by telephone from an unknown source "concerning the following alleged gambling houses," among others naming "Daniel O'Dogherty, 752 East 39th street, first floor, handbook." On November 4, 1925, Chamberlin again in writing notified the Superintendent of Police that "on Monday, November 2, some person unknown to this office telephoned that the same places reported to you as alleged gambling houses in my letter of October 29 were still running, that on Saturday and Sunday they were heavily patronized."

taken in open court. The proof tended to show that the complain-
ant, Daniel O'Doherty, was the lessee of certain premises situated
in the City of Chicago, Cook County, Illinois, known and described
as No. 782-84 West Twenty Ninth, building the same under a written
lease dated April 30, 1926, for a term commencing May 1, 1926, and
ending on April 30, 1927. The written lease provided that the
premises should be occupied for liquor store and not drink parlor.

On April 23, 1928, complainant, O'Doherty, subleased
that part of the premises known as No. 784 to John Lytton, the sub-
lease providing that the lessee should occupy the premises as a
liquor-room for the sale of soft drinks only. It appears that No.
782 and 784 were at one time connected at the rear by means of a
door, which has since been closed up by a solid brick wall. The
premises known as No. 784 were twice raided by the police, fifty
one having been taken out on October 6, 1928, and thirty-one, in-
cluding complainant, O'Doherty, were on another occasion in 1928
charged with gambling.

On January 6, 1928, complainant obtained a real es-
tate broker's license from the State of Illinois, and on January
, 1928, a similar license from the City of Chicago.

On October 30, 1928, the Chief of Police received
written notice from Henry Barrett Chamberlin, operating director
of the Citizens Crime Commission, to the effect that complaint
had been made to the office of the Commission by telephone from an
citizen across "concerning the following alleged gambling houses,"
among others under "Daniel O'Doherty, 782 West 29th street, first
floor, backroom." On November 1, 1928, Chamberlin made in writing
to Chief the accusation of Police that "on Monday, November 5,
some person unknown to this office informed that the same places
reported in you as alleged gambling houses in my letter of October
were still running, that on Saturday and Sunday they were
heavily patronized."

The bill alleges that members of the police department of the City of Chicago, without warrant of law or authority, invaded these premises on January 15, 1925, and made an illegal search of the premises and of the persons of complainant and other employees, and that complainant "is informed and believes will continue to visit said premises and force their entrance thereto, search your orator's person and the premises and without warrant of law or authority, and have so stated and threatened to do, at any time they were in the neighborhood."

The evidence tends to show that on January 15, 1925, two officers entered No. 752; that they stopped one man as he was getting up, and that these officers searched everyone who was in the place, including the complainant; that they made complainant get up and searched him and ordered him to the rear; that they asked him to open a safe, which he told them he did not have to do, but in the meantime the other officers were searching and ordered the occupants out, and told them if they came back again they would break open the safe and lock them up; that the police officers forced open the drawers to complainant's desk; that when they searched complainant they pulled him out of a chair, went through his vest and took his book. Complainant says there had been no disturbance prior to that time; that there was a deck of cards "but no one playing at the time;" that he did not use the premises for the purpose of gambling, and that they had not been so used at any time since he secured the license. He says the police officer told him at the time that they would chase anybody out there that they would find.

One Coey, an employee of complainant O'Doherty, testified that he was a licensed real estate salesman to the extent that he had an acknowledgment of a receipt but had not as yet secured his license; that he was present at the time of the entrance

of these police officers; that he was pulled out of his chair and the officers went through his clothes, put their hands in his pockets, took out the stuff they wanted and gave it back to him; that before they came in the witness was talking with Mr. O'Doherty, and that was all. Cosy said he had been in business for his own account for a salary in Chicago as a speculator more than anything else; that he had not been doing anything for some eight months, and that prior thereto he was in the stock and bond business; that he had been practically idle eight months, traveling some; that O'Doherty had just opened this real estate place; that prior to that time his sole business was the soft drink parlor and eating house, and that he had been in that business for ten years.

Officer Doyle, who is one of the parties who made this raid, testified that he had a telephone call with reference to the place; that he went to the rear of the place and found about seven men, possibly eight, sitting at a long table; that they arrested everyone in the place, telling them that they were police officers, and that one of the man was surly and said that "he knew damn well we were police officers," and would not stand up; whereupon they grabbed him by the coat and got him up on his feet and searched him; also that they pulled out a drawer in the table behind the radiator, looked in several other places where it was supposed something might be concealed, but did not find what they were looking for, which was guns.

The other officer engaged in this raid, whose name was Dawe, testified that he was connected with the Detective Bureau squad; that when they went there they found four or five people playing cards, so they stood them all up and searched them; that one of the men said, "I knew you are police officers;" that this man was slow about getting up, so they took him by the coat collar and stood him up; that he, the witness, went into a back room

of these police officers; that he was pulled out of his chair and the officers went through his clothes, put their hands in his pockets, took out the stuff they wanted and gave it back to him; that before they came in the witness was talking with Mr. O'Doherty, and that was all. They said he had been in business for his own account for a salary in Chicago as a speculator more than anything else; that he had not been doing anything for some eight months, and that prior thereto he was in the stock and bond business; that he had been practically idle eight months, travelling round; that O'Doherty had just opened this real estate place; that prior to that time his sole business was the sort of talk parlor and selling horses, and that he had been in that business for ten years.

Officer Doyle, who is one of the parties who made this raid, testified that he had a telephone call with reference to the place; that he went to the rear of the place and found about seven men, generally sitting, writing at a long table; that they arrested everyone in the place, telling them that they were police officers, and that one of the men was partly undressed. "We found the men well as were police officers," and would not stand up; whereupon they grabbed him by the coat and put him up on his feet and searched him; also that they pulled out a drawer in the table behind the radiator, looked in several other places where it was supposed something might be concealed, but did not find what they were looking for, which was guns.

The other officer engaged in this raid, whose name was Dare, testified that he was connected with the detective bureau squad; that when they came they found four or five people sitting round, or they stood when all up had searched them; that one of the men said, "I know you are police officers;" that this man was also sitting writing, so they took him by the coat and [illegible] that he. The witness, went into a back room

and asked what they had in the safe, and was answered, "Nothing at all;" that he asked them to open it up and they said they would do nothing of the kind; that when he got out of the door he said that they would hear from the officers later.

The evidence shows without contradiction that the officers entered the premises without a search warrant and without a warrant for the arrest of any person. The briefs for the City of Chicago discuss at length, with numerous citations of authority, the right of police officers under statutes of the State and ordinances of the City to arrest and search persons and premises without warrant, but we do not think that a consideration or determination of the questions raised in that regard are at all necessary to a decision of this case.

We think it is apparent that the things which the injunction restrains the defendants from doing are so indefinitely stated as to make it impossible for any official charged with the enforcement of the law to determine what is or what is not thereby forbidden. The language is so general and the order is so limited by that provision, which provides that nothing in it contained shall restrain the police officers from entering the premises in a lawful manner and in the proper and lawful exercise of the police power, that it would seem at the most to amount to a direction to the police not to violate the law without giving them any information as to the specific things which they might or might not do.

It has been so often decided in this State that the general rule is that courts of equity will not interfere to restrain officials charged with the duty of enforcing the law from enforcing it, that it should be unnecessary to restate the law on that subject. It has been specifically so held in Fayer v. Village of DesPlaines, 123 Ill. 111; People v. Barrett, 203 Ill. 99; Chicago Stock Exchang v. McClaughry, 148 Ill. 372; Shakel v. Roche, 27 Ill. App. 473. If

there is any exception to that rule in this State, we have not been cited to a case which so holds. Cicero Lumber Co. v. Cicero, 176 Ill. 9, is cited and relied on by complainant. That case is easily distinguishable, in that civil rights only and not the administration of the criminal law of the State was there involved.

The decree of the trial court is reversed.

REVERSED.

McSurely, P. J., and Johnston, J., concur.

192 - 31324

ABE SWERDLOVE and SOL MATUS, Appellees, v. JULIUS SHAPERA, EDWARD GLASSER and FRED WEISS, Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action on the case for false and fraudulent representations, a jury returned a verdict for plaintiffs with damages in the sum of $2500, upon which the court, overruling motions for a new trial and in arrest, entered judgment, from which the defendants appeal.

The evidence tends to show that on April 28, 1924, the plaintiffs purchased from the defendants one hundred shares of stock in the Adams 43rd Street Garage, Inc., and also purchased the garage business conducted under that name at No. 916 East 43rd street.

The plaintiffs allege that they were induced to make such purchase by false and fraudulent representations of defendants to the effect that the garage in question was doing a large and profitable business, was paying large dividends, yielding an income over and above all expenses of $500 a month; that the garage, with its equipment, leases, etc., was of a value of $2500 over and above all liens and encumbrances; that the garage was filled to capacity with about eighty-five actual rentals; that the garage, with its equipment, leases, good-will, etc., was owned by the corporation, and that defendants were the owners of all the stock of said corporation; that the same would

In an action on the case for false and fraudulent representations, a jury returned a verdict for plaintiffs in damages in the sum of $2500, upon which the court, overruling motions for a new trial and in arrest, entered judgment, from which the defendants appeal.

The evidence tends to show that on April 30, 1904, the plaintiffs purchased from the defendants one hundred shares of stock in the Adams Street Garage, Inc., and also purchased the garage business conducted under that name at No. 216 Best Street.

The plaintiffs allege that they were induced to make the purchase by false and fraudulent representations of defendants to the effect that the garage in question was doing a large and profitable business, was paying large dividends, yielding an income over and above all expenses of $1500 a month; that the garage, with its equipment, leases, etc., was of a value of $2500 over and above all liens and encumbrances; that the garage was filled to capacity with about eighty-five autom obiles; that the garage, with its equipment, leases, good-will, etc., was owned by the corporation, and that defendants were the owners of all the stock of said corporation; that the same could

be transferred to plaintiffs, and that plaintiffs would thereby become the owners; that the total encumbrances against the said public garage business was $2500, payable $100 a month; that the debts and outstanding accounts due and owing by the corporation would not exceed the sum of $200; that all of these representations, upon which plaintiffs relied, were false and known by defendants to be false; that the business was not profitable; that they did not yield an income over and above all expenses of $500 a month, or any other sum, but had for a long time been operated at a loss; that the garage was not of a value of $2500 over and above all liens and encumbrances; that the value of the same was less than the amount of the liens and encumbrances against it; that the garage was not filled to capacity by eighty-five actual rentals, but, on the contrary, there were no more than thirty-seven cars or automobiles which were actual bona fide rentals, and that the income from the actual rentals of the garage business was insufficient to pay the overhead operating expense; that there was at that time an ordinance of the City of Chicago in force and effect which required any person conducting the business of a public garage to obtain a license therefor; that defendants had applied for such license to conduct such garage, and that the license had been denied; that the building in which the garage was in operation had been condemned by the fire department of the City of Chicago as unfit for the public garage business, and that the fire preventive department of the City of Chicago notified the defendants that they could not maintain or conduct a garage business at that place; that there were outstanding accounts against the said business of more than $500 unpaid.

The various propositions submitted by defendants

be transferred to plaintiffs, and that plaintiffs would thereby assume the owners; that the total encumbrances against the paid public garage business was [illegible], particularly since a month; that the debts and outstanding accounts due and owing by the corporation would not exceed the sum of $3000; that all of these representations, upon which plaintiffs relied, were false and known by defendants to be false; that the business was not profitable; that they did not yield an income over and above all expenses of $800 a month, or any other sum, but had for a long time been operated at a loss; that the garage was not of a value of $8000 over and above all liens and encumbrances; that the value of the same was less than the amount of the liens and encumbrances; that the garage was not fitted to compare by slightly-fit actual rentals, but, on the contrary, there were no more than thirty-seven cars or automobiles which were actual paying trade customers, and that the income from the actual rentals of the garage business was insufficient to pay the overhead operating expenses; that there was at that time an ordinance of the City of Chicago in force and effect which required any person conducting the business of a public garage to obtain a license therefor; that defendants had applied for such license to conduct such garage, and that the license had been denied; that the building in which the garage was in operation had been condemned by the fire department of the City of Chicago as unfit for the public garage business, and that the fire prevention department of the City of Chicago notified the defendants that they could not obtain or conduct a garage business at that place; that there were outstanding accounts against the said business of about the $800 mentioned.

The various propositions contained by defendants

all go to the point that the evidence in the case was insufficient to support the verdict and judgment. Defendants point out that the burden of proving a fraud is on the party alleging it; that the evidence to sustain a charge of fraud must be clear and convincing and leave the mind well satisfied that the allegations of fraud are true, that as a general rule false assertions concerning value are not actionable and do not relieve the vendee of the responsibility of investigating; that a party has a right to praise his own property and is not bound to underestimate its value; that fraud must be affirmatively proved like any other fact; that where transactions are as equally open to an honest interpretation as to a dishonest one, good faith will be presumed; that mere concealments will not usually amount to fraud; that it is the duty of a vendee to investigate fully before purchasing; that plaintiffs cannot recover if they did not rely on the representations, all of which are elementary propositions of law as applied to cases of this character.

A fraud is a false representation of a material fact made with knowledge of its falsity or in disregard of whether it be true or false with an intention to deceive, and which does deceive and which results in injury. We have examined the evidence in this case and are constrained to hold, not only that we cannot say that the jury was not justified in returning the verdict or the court in entering judgment, but that any other verdict or any other judgment would have amounted to a miscarriage of justice.

Even if it is conceded that the alleged statement as to the value of the property was only an expression of opinion and therefore insufficient to sustain a charge of fraud, the other charges made and established by a preponderance

of the evidence are more than sufficient to justify the verdict.

The jury were justified in believing that the plaintiffs relied upon the false statements made, one of which was that the reason for desiring to sell the garage was that defendants might have more time to devote to another business, whereas the real reason was that the city had refused to issue a license on the recommendation of the fire department.

The jury was also justified in believing (which we think the evidence showed beyond any reasonable doubt) that while defendants represented that the garage was bringing in an income that assured a substantial profit it was not in fact taking in enough to pay expenses.

Any one of these false statements, knowingly made (upon which plaintiffs relied and were damaged) is sufficient to sustain the verdict.

The judgment is just and it is affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

201 - 31333

HORACE L. BRAND, Appellee, vs. ROBERT BEARDSLEY and ESTELLE D. BEARDSLEY, Appellants.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendants have perfected this appeal from a judgment against them and in favor of the plaintiff, for the sum of $900, entered upon the verdict of a jury, after motions for a new trial and in arrest had been over-ruled.

The first point urged for reversal is that the court erred in denying the motion of defendants in arrest of judgment. This motion was in writing and was stated to be made upon the ground that the action was an action on the case, while the averments of the declaration showed an action ex contractu only.

The declaration in question, in the introductory part thereof, states that the plaintiff complains of a "plea of trespass on the case," and the record discloses that to this declaration, which is in three counts, the defendants filed pleas of not guilty, which were appropriate pleas to an action on the case. The verdict of the jury was also in form responsive to such an action, namely, guilty, and the record shows that the defendants in instructions asked in their behalf requested a verdict in that form.

The declaration in substance averred that defendants became lessees of the plaintiff under the terms of a written lease, which was attached to the declaration; that the lease specified that the premises should be used by defendants for an art studio, and for no other purpose, and that under the terms

of the lease, the defendants acknowledged that they had received the premises in good repair and promised to restore the same in that condition with the exception of ordinary wear and tear; that they used the premises for purposes other than those for which the same were demised and neglected their duty with respect thereto, to the damage of the plaintiff.

The defendants contend that the plaintiff has mistaken his form of action, and cites 1 Chitty on Pleading, page 200, to the effect that -

> "In order to prevent the confusion which might ensue if different forms of actions, requiring different pleas and different judgments, and of a different nature, were allowed to be joined in one action, it is a general rule that actions in form ex contractu cannot be joined with those in form ex delicto."

They also cite and rely on the statement of the same author, pages 264-5, to the effect that -

> "The consequences of a misjoinder are more important than the circumstances of a particular count being defective; for in the case of a misjoinder, however perfect the counts may respectively be in themselves, the declaration will be bad on a general demurrer, or in arrest of judgment, or upon error."

In their reply brief, however, defendants shift their ground somewhat and state their point to be that, having instituted suit and the nature of the suit being determined as an action ex delicto, it was improper to join in the declaration counts in an action ex contractu.

Further authorities are not cited, nor are we informed by the brief of the defendants what particular edition of the several works of Chitty is relied upon, nor are we informed by defendants, in connection with this shifting position, which particular counts of the declaration are regarded by them as being in tort and which in contract.

After a considerable search through dust covered volumes, we have found the quotations from Chitty upon which defendants rely in a volume which, the preface indicates, was

prepared by that author prior to the 7th of November, 1808, and which was published in 1828. It was no doubt improper at that time (and under good practice in pleading is, we doubt not, still improper) to declare in case when the action is in fact in assumpsit or to join in the same declaration counts in case and in assumpsit. (See Cobbert v. Packington, 13 English Common Law Reports, page 131.) Prior to the enactment of the statute on that subject, in conformity with the general rule, it was held in Illinois that counts in trespass and in case were improperly joined together. (Dalson v. Bradberry, 50 Ill. 82.) These cases also hold that in case of such misjoinder either of causes of action or counts the declaration would be bad, and that a motion in arrest of judgment would be allowed.

That either an action in case or in assumpsit is proper, and that these are concurrent remedies for wrongs such as these of which the plaintiff here complains, is held in the well considered case of Kevin v. Pullman Palace Car Co., 106 Ill. 222; and that a misjoinder of counts may not be taken advantage of upon motion in arrest of judgment has been decided in C. & A. R. R. Co. v. Murphy, 198 Ill. 462.

The statute of Amendments and Jeofails, Smith-Hurd Ill. Rev. Stat. 1925, p. 113, chap. 7, sec. 6, provides:

> "Judgment shall not be arrested or stayed after verdict *** Fifth -- For any misleading, insufficient pleading, lack of color, miscontinuance, discontinuance or misjoining of the issue, or want of a joinder of the issue."

The first contention of defendants therefore cannot prevail.

In the second place, defendants contend that the judgment must be reversed because, as they say, the record fails to show that plaintiff made a demand upon defendants to pay the amount of money needed to make such repairs as were required in order to

restore the premises. This contention, however, is inconsistent with the assertion of defendants that some of the counts of the declaration are in tort. Our attention has not been called to any case where it has been held that a previous demand is necessary in order to maintain a suit in an action upon the case. Defendants cite Flersheim v. Palmer, 99 Ill. App. 559, which was an action in debt upon a bond, and Baker v. Whiteside, 1 Breese 132, which was an action upon a contract for failure to convey a lot of ground as agreed, neither of which are similar to this case upon the facts.

It has been held in Chicago Rock Island & Pacific R.R. Co. v. Steckman, 125 Ill. App. 299, that notice to the defendant before bringing suit is unnecessary in an action on the case to recover for personal injuries. In Niemeyer v. Brooks, 44 Ill. 77, it is held that in an action on the contract a demand is unnecessary unless there is an express stipulation in the contract to that effect; and in Ward v. Montgomery, 67 Ill. App. 346, it was held that where the circumstances of a case are such as to clearly show that a demand would be entirely unavailing, a formal demand before bringing suit is unnecessary. The record here shows that such a demand would have been unavailing.

In the third place, the defendants contend that the verdict is against the evidence and that the rulings of the court and the instructions of the court with respect to the evidence are erroneous. The written lease between plaintiff and defendants recites that the premises were entered upon in good repair, except as therein otherwise specified. By another provision of the lease it was stipulated that the lessee would pay for any and all repairs that should be necessary to put the premises in the same condition as when the lessee entered therein, reasonable wear excepted.

Attached to the lease was a rider which specifically recited certain respects in which the premises were not in good

repair and recited that the plaintiff lessor would make the necessary repairs in these respects. There were something like twenty-five different things which the lessor agreed to do in order to put the premises in proper condition. The lease did not fix the time within which these repairs should be made, but plaintiff, we think, correctly argues that the law would presume that this work would be done within a reasonable time.

The testimony of the plaintiff tended to show that the plaintiff did proceed to make these changes, and that it took him about three months to complete them. The term of the lease began on June 1, 1919, and defendants entered into possession on that date. The lease was executed under date of May 13, 1919, prior thereto. The defendants complain that the court refused to admit evidence offered by them tending to show the actual condition of the building, either on the date of the lease or upon the date on which the actual entry was made, but on the contrary limited the evidence to the condition in which the building was after the repairs as agreed had been made by the plaintiff.

In this situation, the jury was entitled to the facts. It would have been manifestly unfair to have permitted evidence to be given to the jury as to the actual condition of the premises at the time the lease was made and at the time defendants entered, without also permitting evidence to be offered by the plaintiff tending to show that he had made these repairs as agreed, and both sides were entitled, if they requested the same, to instructions to the jury as to the law applicable. The defendants say that the record is confusing and contradictory with reference to the admission of evidence upon this point, but they do not point out to us the specific rulings upon the evidence of which complaint is made. Manifestly, we cannot search the record to discover error which they do not point out.

The defendants also contend that the statement that

the premises were received in good repair is a relative term; that a structure which was intended to be used as a slaughterhouse or a foundry might be considered to be in a good state of repair, when, in the same condition, it would not be considered in a condition of good repair for use as a dwelling house. They also say that the lease must be construed with reference to the use which was to be made of the demised premises, namely, that of an art studio, and they say that the physical condition of art studios is well known and well expressed by the colloquial term "Bohemian." When, therefore, the stipulation was made that the premises were entered upon in good repair, it must be construed as meaning in good repair in view of the use that was to be made of the same, namely, that of an art studio. The defendants say that in specifying the particulars in which plaintiff claimed the premises ought to be restored and with reference to which they were not restored, plaintiff assumed that the premises must answer to the description of good repair as that term would be properly applicable to a fine first-class residence, and they point out that the plaintiff sought to charge the defendants with the cost of complete new plumbing, with polishing the floors, with replacement of sink, pipes, hot water heating apparatus, art glass, bent plate glass, moulding, etc.

All of this was a proper matter for the consideration of the jury. It is significant that whereas the testimony tended to show that the plaintiff had expended the sum of $3342.38 in repairs upon the premises, the verdict of the jury allowed plaintiff damages only to the extent of $900.

The defendants, in the next place, contend that the evidence confused and commingled certain items as to the condition of the premises and cost of repairing the same, and that proof of the cost of certain items was allowed in evidence when said items were not chargeable to the defendants. Among such items are named

[illegible] premises were conveyed in good repair in a relative sense; that a structure which was intended to be used as a slaughterhouse or a foundry might be considered to be in a good state of repair, under the same conditions, it would not be considered in a condition of good repair for use as a dwelling house. They also say that the issue must be construed with reference to the use which was to be made of the demised premises, namely, that of an art studio, and they say that the physical condition of art studios is well known and well experienced by the colloquial term "Bohemian." Therefore, the stipulation was made that the premises were delivered upon in good repair, it must be construed as meaning in general sense in view of the use that was to be made of the same, namely, that of an art studio. The defendants say that in specifically the particulars in which plaintiff claimed the premises ought to be restored and with reference to which they were not restored, plaintiff claimed that the premises must answer to the description of good repair as that term would be properly applicable to a fine first-class residence, and they point out that the plaintiff sought to charge the defendants with the cost of complete new plumbing, with painting the floors, with replacement of sink, pipes, hot water heating apparatus, art glass, bent plate glass, moulding, etc.

All of this was a proper matter for the consideration of the jury. It is significant that whereas the testimony tended to show that the plaintiff had expended the sum of $2412.32 in repairs upon the premises, the verdict of the jury allowed plaintiff damages only to the extent of $800.

The defendants, in the next place, contend that the plaintiff replaced not remodelled certain items as to the condition of the premises and cost of repairing the same, but that some of the cost of certain items was allowed in evidence when said items were not chargeable to the defendants. Among such items are named

changing the toilet bowl from one floor to another, placing a new bowl for the one taken out, rubbing and polishing the floors, but as plaintiff points out, the record shows that this evidence was stricken out by the court and that the attorney for plaintiff, in the presence of the jury, disclaimed any intention to ask for recovery for those items.

It is next contended that the court erred in the giving of instructions which departed from the theory of plaintiff's case as averred in the declaration. Plaintiff says that each count of the declaration alleged that the defendants "failed and refused to pay for repairs that were necessary to put such premises in such condition as they were entered upon, reasonable wear excepted," but that the court gave instructions to the jury upon the hypothesis that the defendants were obligated to make repairs such as would "place said premises in the same condition as they were placed by plaintiff in a reasonable time after defendants entered upon the same, reasonable wear excepted," and that the jury were directed that they might find damages for plaintiff for the same necessarily expended "in and about placing the said premises in the sums condition in which they were placed by plaintiff within a reasonable time after defendants entered upon the same, reasonable wear expected."

The defendants say that these instructions were a departure from the declaration, and the giving of them constituted reversible error within the rule laid down in Himrod Coal Co. v. Clingan, 114 Ill. App. 563; McCabe v. A. T. & S. F. Ry. Co., 154 Ill. App. 380, and Hedger v. Chicago City Ry. Co., 207 Ill. App. 26.

The lease in question was dated May 13, 1919, and the defendants entered upon the premises on June 1, 1919. It was, of course, necessary for the court in its instructions to construe this written contract, and this required that the rider and the lease to which it was attached should be construed together for

[illegible] the jailed boys from one floor to another, placing a man [illegible] for the one taken out, writing and publishing the figures, but [illegible] plaintiff points out, the record shows that this evidence was [illegible] out by the court and that the attorney for plaintiff, in [illegible] presence of the jury, disclaimed any intention to ask for [illegible] for those items.

It is next contended that the court erred in the giving [illegible] instructions which disposed from the theory of plaintiff's case [illegible] entered in the deliberation. Plaintiff says that such course of [illegible] instructions allowed that the defendants "relied and returned to [illegible] for reasons that were necessary to put such pressure in such [illegible] on a jury more enforced upon, reasonable were expected," [illegible] that the court gave instructions to the jury upon the hypothesis [illegible] the defendants were obligated to make repairs such as would [illegible] only previous in the same condition as they were placed [illegible] plaintiff in a reasonable time after defendants entered upon the [illegible], reasonable were expected," and that the jury were directed [illegible] that they did find damages for plaintiff for the same necessarily [illegible] "is and about placing the said premises in the same condition [illegible] in which they were placed by plaintiff within a reasonable time [illegible] after defendants entered upon the same, reasonable were expected."

The defendants say that these instructions were a departure from the declaration, and the theory of them contributed [illegible] erroneously error within the rule laid down in Illinois Cent. R. R. [illegible] Illinois, 114 Ill. App. 668; Hughes v. A. T. & S. F. Ry. Co., 144 Ill. App. 588, and Dalton v. Chicago City Ry. Co., 201 Ill. App. 74.

The issue in question was denied May 13, 1910, and the [illegible] entered upon the pleadings on June 7, 1910. It was, of course, necessary for the court in the instructions in controversy [illegible] the written contract, and this required that the rights and the [illegible] case to which it was attached should be construed together. [illegible]

the purpose of ascertaining the intention of the parties. Manifestly, it could not have been the intention of the parties that the defendants should be required, at the expiration of the lease, to take out the repairs which plaintiff, by the terms of the lease, had been required to put in. Such a construction of the writings would have been ridiculous. The instruction may not have been entirely accurate, in that it fails to cover the liability or obligation upon the defendants to repair and restore such items as may have become defective between June 1, 1919, and the date upon which plaintiff completed the agreed repairs, but in this respect the instruction was favorable to the defendants rather than to the plaintiff. They have no reason to complain.

The cases cited are easily distinguishable, but to discuss them would extend this opinion unduly and even a casual examination discloses the cases are not similar.

Defendants further contend that the remarks and conduct of the trial Judge in the course of the trial were improper to such a degree as to constitute reversible error. The record discloses in some places remarks by the court which were discourteous to counsel in the case, as where the court said:

> "You hear what I said, didn't you?
> Mr. King: Yes.
> The Court: Now, keep quiet.
> Mr. King: All right. Exception.
> The Court: Don't be so disputatious."

Or again, where the court said to counsel, "You may ask a lot of foolish questions," or again, "Don't harangue the court," or again, "Don't talk so much," or again, "He is going his own weary way," or again, "Don't argue with me. ** Don't waste any more time," or again, "I submit that you will keep your seat and keep quiet," or again, "If I let you start talking, you'll never finish."

We do not find anything in the record which would justify the court in making remarks of this kind, but it must be

the privilege of understanding the intentions of the parties. Doubtedly, it could not have been the intention of the parties that the defendants should be required, at the implication of the issues, to take out the regular water privilege, by the terms of the lease, had been required to put it. Such a construction of the writing would have been ridiculous. The instrument may not have been entirely accurate, in that it fails to cover the liability or obligation upon the defendants to repair and restore such fixtures as may have become defective between June 1, 1919, and the date upon which plaintiff completed the agreed repairs, but in this respect the instrument was favorable to the defendants rather than to the plaintiff. They have no reason to complain.

The cases cited are easily distinguishable, but to discuss them would extend this opinion unduly and even a cursory examination discloses the cases are not applicable.

Defendants further contend that the remarks and conduct of the trial judge in the course of the trial were improper to such a degree as to constitute reversible error. The record discloses in some places remarks by the court which were disapproved to counsel in the case, as when the court said:

"I've been what I said, didn't you?
Mr. King: Yes.
The Court: Now, keep quiet.
Mr. King: All right. Excepted.
The Court: Don't be so disrespectful."

At again, when the court said to counsel, "You may ask a lot of foolish questions," or again, "Don't harrass the court," or again, "Don't talk so much," or again, "He is going his own way," or again, "Don't argue with me, or I don't waste my time," or again, "I submit that you will keep your cool and keep quiet," or again, "If I let you start talking, you'll never finish."

We do not find anything in the record which would justify the court in making remarks of this kind, but it must be

said in fairness that remarks of this sort seem to have been distributed among counsel in the case and witnesses with impartiality. The court stated of a witness for the plaintiff, "He ought to be sent to jail," and remarked to counsel, "It is your business to bring witnesses here that can answer the questions you wish them to, not to impose an awfully deft, willful man upon us. I think he must have been a witness before because he runs away from everything."

Not attempting to condone this language (for courts should be respectful and dignified), we are disposed to hold that the impartiality with which these censures were distributed prevented injury to the cause of the defendant. We therefore hold that the error in this respect was not reversible.

It is next contended that the court erred in refusing to receive evidence offered by defendants tending to show that defendants had been damaged in consequence of plaintiff's failure to keep a covenant in the lease with reference to the repair of the roof. Defendants say that, although no claim of set-off was filed, they had a right to recoup, and cite Babcock v. Trice, 18 Ill. 420; Cook v. Preble, 80 Ill. 331; Keating v. Springer, 146 Ill. 481; Sels v. Stafford, 284 Ill. 610.

It is true that recoupment may be had by a tenant when sued in an action for rent under a plea of the general issue. Defendants here, however, did not plead the general issue, but not guilty. No cases are cited holding that in an action on the case under such a plea a defendant may give evidence tending to show a right of recoupment.

As already said, the record in this case, considering the amount involved, is voluminous. The case was tried under a declaration, where (we do not doubt as defendants contend) there was a misjoinder of counts, and the task of reviewing the record

is (as undoubtedly that of trying the case under the pleadings was) exceedingly difficult. We think substantial justice has been done, notwithstanding there may be some error in the record. Defendants did not demur to the declaration, as they might have done. They did not ask the court to require the plaintiff to elect upon which counts he would proceed, a motion which, if made, we suppose would have been granted. We do not think the parties should be put to the expense of another trial, and in view of the fact that, by a somewhat devious path, substantial justice has resulted, the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

323 - 31455

THE FLEXPLUME CORPORATION, a corporation, Appellee, v. JOSEPH WURTZBURG, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action on a written contract and upon trial by jury there was a verdict for plaintiff in the sum of $909.87, on which the court, overruling motions for a new trial and in arrest entered judgment.

The statement of claim alleges that on or before December 10, 1923, the plaintiff entered into a contract with the defendant to manufacture and deliver to the defendant three electric signs at a price of $1013. The contract is set up in haec verba and specifically states that the price does not include electrical connection from the sign to the building and further states that the "price does include securing permit;" that "price does include paying city inspection fee," and that "private permits will not be guaranteed."

The statement of claim further averred that plaintiff manufactured the signs; that on or about April 9, 1923, plaintiff delivered the same to the defendant; that it did all that it was required to do under the terms of the contract; that defendant paid on said account the sum of $200; that plaintiff was entitled to interest on the balance because of unreasonable and vexatious delays; that by agreement with the defendant it changed a word in one sign at the additional and agreed reasonable price of $14.16,

and that there was a total amount due of $854 with interest, for which it repeatedly demanded payment, which was refused.

The defendant filed an affidavit of merits, in which he admitted the manufacture and delivery of the signs, admitted that he had paid the sum of $200, and admitted that he owed to the plaintiff a net sum of $249 for two of the signs which he averred he was ready and willing to pay; that the third sign was never delivered to the defendant in accordance with the terms and provisions of the contract, and that he was therefore absolved from payment or any liability.

By amendment to his affidavit of merits, the defendant alleged that he signed the agreement set out in plaintiff's statement of claim, relying on representations of the plaintiff that plaintiff had secured the consent of the owners of the building, upon which the sign was to be erected; whereas, the truth was that the owners, who were the agents of the building, had not consented to the erection of the sign, and on the contrary advised the plaintiff they would not permit the erection of said sign on the building; that defendant would not have executed the agreement but for these representations of the plaintiff.

The first contention of the defendant is that plaintiff having sued on a written contract alleging complete performance could not recover without proving such fact; that the third sign was not connected as agreed, and that it was therefore the duty of the court, at the conclusion of all of plaintiff's evidence, to direct a verdict for the defendant. On what theory the court could have granted the defendant's motion for a verdict in its favor when the pleadings admitted money to be due upon the contract, we are not informed. We have no doubt it would have been error to grant the motion.

[illegible] that there was a total amount due of $884 with interest, [illegible] which it repeatedly demanded payment, which was refused.

The defendant filed an affidavit of merits, in which he admitted the manufacture and delivery of the signs, admitted that he had paid the sum of $300, and admitted that he owed the plaintiff a net sum of $540 for two of the signs which he averred he was ready and willing to pay; that the third sign he never delivered to the defendant in accordance with the terms and provisions of the contract, nor that he was therefore relieved from payment of any liability.

By amendment to his affidavit of merits, the defendant alleged that he signed the agreement not as plaintiff's statement of claim, relying on representations of the plaintiff that plaintiff had secured the consent of the owners of the building, upon which the sign was to be erected; whereas, the truth was that the owners, who were the agents of the building, had not consented to the erection of the sign, and on the contrary advised the plaintiff they would not permit the erection of such sign on the building; that defendant would not have executed the agreement but for those representations of the plaintiff.

The first contention of the defendant is that plaintiff having sued on a written contract alleging complete performance could not recover without proving such fact; that the third sign was not accepted as agreed, and that it was therefore the duty of the court, at the conclusion of all of plaintiff's evidence, to direct a verdict for the defendant. In what lively the court would have granted the defendant's motion for a verdict in his favor when the plaintiff rested many to be due upon the contract, we are not informed. We have no doubt it would have been error to grant the motion.

There was a conflict in the evidence as to whether the plaintiff represented that he had secured the consent of the owners of the building to attach the sign. The verdict of the jury upon that issue of fact is in favor of the plaintiff. We are not disposed to disagree with the jury. We do not think the written contract can be construed as requiring the plaintiff to obtain the consent of the landlord. We think that would be a very unreasonable construction of the contract. It was clearly, in our opinion, defendant's duty to obtain this permission from the landlord, and, since the evidence indicates that plaintiff was ready and willing to connect the sign and would have done so had he not been prevented by plaintiff's landlord, it must be held that he substantially complied with the provisions of the contract. Defendant, not plaintiff, was in default, and defendant cannot use his own default as a defense.

It is next urged by the defendant that the court erred in permitting the office manager of the plaintiff corporation to testify as to instructions given by him to an agent of the plaintiff in regard to securing permits for the erection of signs. This evidence perhaps should have been excluded, but as the matter testified to, in our opinion, gave the proper construction of the contract, which was at any rate for the court, we think the error, if any, was harmless.

The defendant next contends that there was no conflict in the evidence which justified submitting to the jury the question of whether there had been a full performance of the contract on plaintiff's part, and for that reason he also insists that an instruction to find for the defendant should have been given.

We agree that the evidence upon material points is not

in conflict, but think under the undisputed evidence the plaintiff was entitled to recover.

The judgment is therefore affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

366 - 31498

JOHN J. BIESKE, Appellant, vs. PETER J. BARMAN, Appellee.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff below from a judgment in favor of the defendant, entered upon the verdict of the jury, returned in response to a direction so to do by the court.

The controlling question is whether the court erred in directing this verdict.

The declaration averred that on December 13, 1923, defendant drove his automobile so negligently in a northerly direction upon a public highway known as the Waukegan Road, that it struck plaintiff while plaintiff was in the exercise of due care.

Other counts charged negligence in failing to sound a horn or give other warning, in operating the automobile at an unreasonable speed, contrary to the statute, and in failing to carry a lamp of yellow or amber tint, as required by the statute.

The defendant filed a plea of not guilty and a special plea. An instruction was given at the close of plaintiff's evidence. The sole question is whether plaintiff was guilty of such contributory negligence as would bar a recovery. It is, of course, elementary that in this state a plaintiff must allege and offer evidence tending to prove due care for his own safety, and, failing so to do, he is not, as a matter of law, entitled to recover.

The evidence tends to show that at the time of the accident the plaintiff was a night watchman for one Donahue, who had a contract for laying water pipes, called main pipes, in Niles,

Illinois; that these pipes were being laid in the Waukegan Road, and that it was plaintiff's duty to take care of the lights and parts of the machines so that nobody would run into the machines or into the dugout made for the pipes.

The excavation there was about five blocks north of the place where the accident happened and on the east side of the Waukegan Road, which at that point ran north and south, with a slight curve toward the point of the excavation. It was the duty of the plaintiff to look after the road light at the excavation, which was about 200 feet long, and plaintiff had placed lights there about fifteen feet apart. The excavation, on which the lights were placed on the west side of the road, was about a foot and a half from the concrete.

Plaintiff set the lights and then went south along the Waukegan Road, as he says, to see how the lights were set, and he went south far enough so that he could see that the automobile drivers could see the lights in case they happened to hit the curve, and see that there would be danger before them.

After going far enough south for this purpose, he turned around to go back north, and just as he turned to walk north he says he looked around but didn't see anything coming, so he stepped out a little further to see if he could see more than one light on the curve, and there he was hit.

He says that as he turned around to size up the lights he was on the east side of the road, for the reason that he wished to get a view of the north-bound automobile drivers to see that they could cut the curve ahead to the north and see the lights there; that he went to the east side of the road to get the viewpoint of the drivers. This point of the road was near to the residence of a Mr. Garwych, which was situated on the west side of the road. Plaintiff walked about ten steps after he turned around - ten or fifteen steps, he says - when he was hit. He saw nothing of the automobile

limits; that some place were being laid in the Tongue Road, and
of it was plaintiff's duty to take care of the lights and parts of
a warrant so that nobody would run into the machines or into the
ment made for the place.

The excavation there was about five feet north of
place where the accident happened and on the east side of the
Tongue Road, which at that point was north and south, with a
light curve toward the point of the excavation. It was the duty of
plaintiff to look after the red light at the excavation, which
about ONE foot long, and plaintiff had placed lights there about
fifteen feet apart. The excavation, on which the lights were placed
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drivers. This point of the road was near to the residence of a
Gorman, who had erected on the west side of the road. Plain-
f said that he stepped about - ten or fifteen
ds, he says - when he was hit. He saw nothing of the automobile

before he started to walk north until he saw it close to him, and that was all he knew. He says there was no horn sounded and nothing but the brakes attracted his attention to the automobile before it struck him. It was a very clear night in the fall of the year, and he was dressed for all night work.

Walter E. Garwych, the owner of the residence, testified that between six and six-thirty in the evening, while he was having supper at his home, he heard a sudden scream and the sudden sound of squeaking brakes; that he immediately ran down and saw an automobile parked on Waukegan Road, going north, and found the plaintiff lying in front of this automobile; that plaintiff was lying on the left-hand side of the automobile, in front of it and in front of the wheel; that the automobile was on the east side of the road going north; he says that he saw at the scene of the accident the chauffeur of the automobile and a man passenger, and Mr. Teets, a neighbor, of Niles, and the plaintiff. His recollection is that the lights on the car were very dim. Mr. Teets and the witness, with the help of the owner of the car, put plaintiff in the rear seat of the automobile. Plaintiff was unable to walk and was screaming with pain. He says there were cinder sidewalks on both sides of the road. There is a shoulder of earth on each side of the concrete about four feet wide, and then the cinder sidewalk, and then the ditch for draining. At the point where the accident happened, Waukegan Road runs almost straight north, and that point is about four or five hundred feet north of the intersection of Milwaukee avenue and Waukegan road. There were street lights along the road, and the accident happened right in the village of Niles. The street lights were far apart, possibly a block apart. He says that he remembers the lights were cowl lights, and that at the time he ran out there was no traffic on the road.

The defendant, called as a witness by the plaintiff, testified that he owned and operated a Cadillac taxicab of his own for the University Club, and had operated automobiles since 1910; that on the evening of the accident he had a passenger, Dr. Zimmerman; that at the time of the accident the weather was fair; that there were a few street lights on the Waukegan Road, but he didn't pay much attention to that; that he was driving about twenty-five, maybe faster, a trifle faster, thirty miles an hour; on the east side of the Waukegan Road, about a foot from the edge of the concrete; that he saw the man when he was about eight or ten feet in front of him; that when he saw him, he tried his best to stop, put on the brakes, but that he didn't blow the horn or anything; that he had regular Cadillac cowl lights, but did not have the lights burning in front; that the lights would show about 300 feet; that there were no other cars in front; that he was looking ahead all the time while he was driving, but did not see this man until he was ten feet in front of him.

At this point the court told the plaintiff that he had no case, denied a motion to withdraw a juror and continue the case, and indicated that he would direct a verdict, and, after evidence of the physician who attended the plaintiff and who testified to facts showing damage, the instruction was given. It is wholly unnecessary to discuss at length the very numerous cases cited by defendant in support of the ruling of the trial court. Among others, he relies on O'Reilly v. Davis, 120 N. Y. S. 883, where a pedestrian walking on a streetcar track, hearing a car in front of him stepped off the track into the road, with which he was familiar and which was much traveled by vehicles. The plaintiff pedestrian testified that as he was stepping off the rail he looked back and did not see anything, and then stepped off and walked four or five feet, when he was hit by defendant's automobile. He also said he could see in back of him for a distance of

The defendant, called as a witness by the plaintiff, testified that he owned and operated a Cadillac taxicab of his own for the University Club, and had operated automobiles since 1917; that on the evening of the accident he had a passenger, Mr. Zimmerman; that at the time of the accident the weather was fair; that there were a few street lights on the Sunderman Road, but he didn't pay much attention to that; that he was driving about twenty-five, maybe faster, a little faster, thirty miles an hour; on the east side of the Wankegan Road, about a foot from the edge of the concrete; that he saw the man when he was about eight or ten feet in front of him; that when he saw him, he tried his best to stop, put on the brakes, but that he didn't blow the horn or anything; that he had regular Cadillac cowl lights, but did not have the lights burning in front; that the lights would shine about 200 feet; that there were no other cars in front; that he was looking ahead all the time while he was driving, but did not see this man until he was ten feet in front of him.

At this point the court told the plaintiff that he had no case, denied a motion to withdraw a juror and continue the case, and indicated that he would direct a verdict, and, after testimony of the physician who attended the plaintiff and who testified to facts showing damage, the instruction was given. It is clearly unnecessary to discuss at length the very numerous cases cited by defendant in support of the ruling of the trial court. Among others, he relies on Wheeler v. Towle, 180 Ill. App. 223, where a pedestrian walking on a streetcar track, hearing a car in back of him stepped off the track into the road, with which he was familiar and which was much traveled by vehicles. The plaintiff testified that as he was stepping off the rail he looked back and did not see anything, and then stepped off and walked from ten to fifteen feet, when he was hit by defendant's automobile. He also said he could see 2½ block of him for a distance of

about 200 feet. Upon this rather ridiculous testimony which, as the court pointed out, indicated that while plaintiff walked five feet an automobile moved 200 feet, which, assuming the man was walking three miles an hour, would indicate the automobile was going 120 miles an hour, the judgment for plaintiff was reversed and a new trial ordered.

Defendant also cites and relies on Prings v. Clausen-Flanagan Brewery, 177 N. Y. S. 168, a case in which a plaintiff had judgment where, according to his testimony, at about half past eight in the evening he had been walking south on the west sidewalk of a certain street until he came to another street, at which point he stepped down into the roadway and continued in the same near the curb of the westerly sidewalk; that when he stepped down into the roadway he looked north and south and could see a distance of about two or three blocks and thereafter he did not look any more, but when half way to the next street was struck from behind by an automobile owned by the defendant, and the court reversed the judgment, holding that plaintiff was guilty of negligence as a matter of law.

Virgilio v. Walker, 98 Atl. 815; and Darus v. West, 191 N. W. 506, are also cited, the one, however, being easily distinguishable, and the other, as we read it, directly contrary to the contention of the defendant, since, in the opinion of the court, it is there stated that defendant's counsel argued that pedestrians on a country highway must look to the rear at stated intervals to see if vehicles were coming; but the court said, "We are aware of no such rule of law."

Defendant also cites Hedmark v. Chicago Ry. Co., 192 Ill. App. 584; Welch v. New Harper Hotel Co., 196 Ill. App. 94; Griffith v. Chicago Ry. Co., 222 Ill. App. 625; Robertson v. Chicago Ry. Co., 226 Ill. App. 661; Myhre v. Chicago Ry. Co., 216 Ill. App.

[illegible] feet. Upon this [illegible] instruction [illegible], an
[illegible] single pointed out, indicated that [illegible] plaintiff walked five
feet in [illegible] seven [illegible] feet, when, assuming the [illegible]
[illegible] were alike in fact, would indicate the [illegible]
[illegible] 180 alike in fact. The jury found for plaintiff and [illegible]
[illegible] a new trial ordered.

Defendant also cites and relies on [illegible] v. [illegible]
[illegible] Sawyer, 177 N. Y. 8, 168, a case in which a plaintiff
[illegible] judgment where, according to his testimony, at about half past
[illegible] in the evening he had been walking south on the west side-
[illegible] of a certain street until he came to another street, at which
[illegible] he stepped down into the roadway and was injured in the same
[illegible] the curb of the westerly sidewalk; that when he stepped down
[illegible] the roadway he looked north and south and could see a distance
[illegible] about two or three blocks and thereafter he did not look any
[illegible], but when half way to the next street was struck from behind
[illegible] an automobile owned by the defendant, and the court reversed the
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[illegible] of law.

[illegible] v. [illegible], 98 App. Div. 88; and [illegible] v. [illegible],
[illegible] N. Y. 506, are also cited, the one, however, being mainly
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[illegible] the contention of the defendant, since, in the opinion of the
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[illegible] on a country highway must look to the rear at stated
[illegible] to see if vehicles were coming; but the court said, "We
[illegible] of no such rule of law."

Defendant also cites [illegible] v. [illegible] Co., 172
App. Div. 344; [illegible] v. [illegible], 164 App. Div. 44;
[illegible] v. [illegible] Co., 224 App. Div. 222; [illegible] v. [illegible]
[illegible], 226 App. Div. 224; [illegible] v. [illegible], 215 App. Div.
[illegible]. The [illegible] and [illegible] Brown [illegible]

128; these latter all being cases in which this court reversed with a finding of fact under supposed authority under a statute which has since been held not to grant such power.

There is no doubt xxxx of the rule of law applicable here, which has been stated so often that it ought not to be necessary to cite authority, namely, if there is any evidence from which a jury acting reasonably can find for the plaintiff, an instruction to return a verdict for the defendant should not be given.

Defendant does not argue that he was not negligent, and in view of all the facts and circumstances indicating that the plaintiff, at the time he received his injury, was in the line of his duty, that he looked back only a few moments before he was struck, and the admitted speed at which the automobile was being driven, the question of whether or not plaintiff was in the exercise of due care, was clearly a matter for the jury.

The court erred in instructing for the defendant. For this error, the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, P. J., and Johnston, J., concur.

375 - 31507

A. TROSTLER,
Appellee,

v.

RAYMOND T. WATERS,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant from a judgment in the sum of $2550, entered upon the verdict of a jury, motions for a new trial and in arrest having been overruled.

Plaintiff sued for commissions alleged to be due to him on account of the sale by defendant to Nicholas V. Deligiannis and Antonio V. Deligiannis, on March 10, 1924, of a parcel of land, at the southwest corner of Halsted and Congress streets for a consideration of $85,000.

Plaintiff's statement of claim alleged that on or about August 14, 1923, defendant gave to plaintiff a description of the land, stated that he desired to sell the property, and requested plaintiff to find a buyer therefor. The plaintiff submitted the property to the Deligiannis brothers, and that as a result of the efforts of plaintiff, the property was sold to them.

The affidavit of merits denies that defendant employed the plaintiff or requested him to secure a purchaser for the property and denies that the property was sold as a result of plaintiff's efforts.

The defendant contends that the court erred in instructions given to the jury; that the plaintiff was not entitled to recover under the evidence and that the verdict of the jury was manifestly against the preponderance of the evidence.

The record indicates that the jury was instructed orally by the court and discloses no specific objection by defendant at the time the instructions were given. A general exception seems to have been taken to the instructions as given, but this is not sufficient to preserve the alleged error for review in this court. We therefore will not reverse for that reason, although we are satisfied from an examination of the instructions that there was error in one or two respects.

The controlling question in the record, as we view it, is whether the verdict is against the clear preponderance of the evidence. The evidence in plaintiff's behalf tends to show that on August 13, 1923, he called upon the defendant and asked him if he was the owner of the property in question; that defendant said he was one of the owners; that the property had belonged to his mother, who upon her death left it to himself and other heirs; that defendant asked plaintiff whether he had any purchaser in view, and plaintiff said he had one for whose business the property was suitable; that defendant said, "'Well, it seems to me that a deal ought to be made here, the broker ought to be able to make a deal here,' and then he asked, 'What do you think you can get for the property.' 'Well,' I said, 'I rather not answer that question.' He said, 'Why not.' I said, 'it might prove embarrassing if I am unable to meet the price that you say I ought to be able to get. I'd rather have you set the price on it.' Then he said, 'Well, we have had some talk about that, and I don't think we will sell that property for less than $85,000." I said, 'Well, I don't know whether I can get that much, that apparently the property would not pay on that basis.'"

Plaintiff says that he then went to see Deligiannis Brothers and on the next day reported to plaintiff an offer of $65,000 for the property; that defendant told him that other

The record indicates that the jury was instructed mostly
on the law, and should see no specific objection by defendant as
to how the instructions were given. A general exception seems
have been taken to the instructions in toto, but this is not
sufficient to preserve the alleged error for review in this court.
Appellate courts will not review for that reason, although we are
satisfied from an examination of the instructions that there was
error in one or two respects.

The controlling question in the record, as we view it,
whether the verdict is against the clear preponderance of the
evidence. The evidence in plaintiff's behalf tends to show that
August 12, 1922, he called upon the defendant and asked him if
was the owner of the property in question; that defendant said
was one of the owners; that the property had belonged to his
father, the upon her death left it to himself and other heirs;
defendant asked plaintiff whether he had any purchaser in
, and plaintiff said he had one for whom purchase the
property for exchange; that defendant said, "Well, it seems to
that a deal ought to be made here, the broker ought to be able
make a deal here," and then he asked, "What do you think you
get for the property?" "Well," I said, "I rather not answer
question." He said, "Why not?" I said, "It might prove
embarrassing if I am unable to meet the price that you say I ought
give you." "I'd rather have you get the price on it."
he said. "Well," he says but some talk about that, and I don't
we will sell that property for less than $80,000." I said,
"I don't know whether I can get that much." that approximately
property would not pay us that much."

Plaintiff says that he then went to see Gallighan
who on the next day reported to plaintiff an offer of
for the property that defendant sell for that other

parties were interested in the property; that he better put it in writing, which he did, but a few days later the offer was declined. Plaintiff then suggested to defendant that the prospective purchasers might raise their offer one or two thousand dollars, but defendant said he would not consider that.

Plaintiff again reported to defendant in October and reported that the prospective purchaser "might offer $70,000," but would not make the offer unless there was some prospect of it being accepted. Defendant told plaintiff to get the offer and put it in writing and he would take it up right away with the other people. On October 23, 1923, plaintiff wrote defendant, making an offer of $70,000, which was the final offer as he said of the purchaser. The letter also stated that $3,000 of the purchase price would be paid in cash, and a mortgage given back for the balance of the purchase price. Plaintiff, in the letter, which is in evidence, strongly urged that defendant accept the offer which he said would not stand open.

Thereafter, defendant informed plaintiff, as plaintiff says, "unless I could get an offer of $85,000, it was useless to ask the other people who were interested with him to make a deal." On November 1st, plaintiff, with Nicholas Deligiannis, saw defendant at his office and plaintiff says that he asked them if they had met before; that they said "No;" that he then told defendant Deligiannis was the party to whom he had been trying to sell the property, and that he had agreed to accept the proposition to pay $85,000 for it; that defendant asked how much cash, and Deligiannis said he could pay $3,000 cash down, $5,000 in six months, $5,000 in twelve months, and a mortgage for the balance. Plaintiff says that he then suggested that defendant ask his own attorney for advice what to do, and defendant agreed

parties were interested in the property that he better put it in writing, which he did, but a few days later the offer was withdrawn. Plaintiff then suggested to defendant that the prospective purchasers might raise their offer one or two thousand dollars, but defendant said he would not consider that.

Plaintiff again reported to defendant in October and reported that the prospective purchaser "might offer $70,000," but would not make the offer unless there was some prospect of it being accepted. Defendant told plaintiff to put the offer and put it in writing and he would take it up right away with the other people. On October 22, 1928, plaintiff wrote defendant, enclosing an offer of $70,000, which was within final offer on behalf of the purchaser. The letter also stated that $2,000 of the purchaser price would be paid in cash, and a mortgage given back for the balance of the purchase price. Plaintiff, in the letter, which is in evidence, strongly urged that defendant accept the offer which he said would not stand open.

Thereafter, defendant informed plaintiff, as plaintiff says, "unless I could get an offer of $80,000, it was useless to ask the other people who were interested with him to make a deal."

On November 1st, plaintiff, with Nicholas Deligiannis, saw defendant at his office and plaintiff says that he asked them if they had met before; that they said "Yes" that he then told defendant Deligiannis was the party to whom he had been trying to sell the property, and that he had agreed to accept the proposition to pay $80,000 for it; that defendant asked how much cash, and Deligiannis said he could pay $[illegible] down, $[illegible] in six months, $2,000 in twelve months, and a mortgage for the balance. Plaintiff says that he then suggested that defendant let his own attorney [illegible] what to do, and defendant agreed

to make an appointment with his attorney as soon as possible; that he saw defendant the next day at the office of defendant's attorney; that the attorney asked what the deal was to be; that plaintiff said, "The property is selling for $85,000," and defendant said, "No, no, I want $85,000 net to us, my people will not stand the expense of the abstract, the stamps on the deed, or the commission."

Plaintiff says that he told the attorney that this would be an unusual proceeding, to which the attorney replied that it was all a matter of agreement. After further conversation, plaintiff says he spoke to Mr. A. Deligiannis on the telephone and told him that defendant now wanted the cost of the abstract and the commission added to it, which would make about $87,900.

On November 5th, thereafter, plaintiff told defendant that he had seen Deligiannis, who had offered to add $500 to the $85,000, rather than have the deal fail; that Nicholas Deligiannis had left the city, and the deal would have to await his return. Plaintiff says that about the middle of December, and after several interviews, defendant told him that the price had been raised to $87,000.

Upon cross-examination, it was developed that plaintiff had several conversations with Deligiannis prior to August 13, 1923, and that he had discussed the property here involved as well as others, and he admits that the first and only discussion as to brokerage commission was in November and in the office of Jarrett, the attorney for the defendant, and that defendant never listed the property with him.

Antonio Deligiannis testifies that he first started negotiations with defendant with regard to the purchase of the property in 1921; that he sent plaintiff over to see defendant

with his attorney

to make an appointment, as soon as possible; that he now defendant
the next day at the office of defendant's attorney; that the
attorney asked what the deal was to be; that plaintiff said,
"The property is selling for $85,000," and defendant said,
"No, no, I want $85,000 net to me, my people will not stand
the expense of the abstract, the stamps on the deed, or the
commission."

Plaintiff says that he told the attorney that this
would be an unusual proceeding, to which the attorney replied
that it was all a matter of agreement. After further conver-
sation, plaintiff says he spoke to Mr. . Deligiannis on the
telephone and told him that defendant now wanted the net of
the abstract and the commission added to it, which would make
about $87,000.

On November 8th, thereafter, plaintiff told defendant
that he had seen Deligiannis, who had offered to add $500 to the
$85,000, rather than have the deal fail; that Nicholas Deligiannis
had left the city, and the deal would have to await his return.
Plaintiff says that about the middle of December, and after
several interviews, defendant told him that the price had been
raised to $87,000.

Upon cross-examination, it was developed that plaintiff
had several conversations with Deligiannis prior to August 13,
1921, and that he had discussed the property here involved as
well as others, and he admits that the first and only discussion
in Kalamazoo commission was in November and in the office
of defendant, the attorney for the defendant, and that defendant
never listed the property with him.

Nicholas Deligiannis testifies that he first started
negotiations with defendant with regard to the purchase of the
property in 1921; that he sent plaintiff over to see defendant

to buy this property, giving him a price of $65,000; that plaintiff came back and told him he could not buy it for $65,000, and that Antonio told him to try and find another property. The witness said that after the deal was closed he heard plaintiff say to his brother that he (plaintiff) worked for the deal and "you ought to give a few hundred dollars, two hundred dollars, because you closed the deal directly with Mr. Waters."

Nicholas Deligiannis testifies that before August 13, 1923, he asked plaintiff to try to buy this piece of property and told him that they had tried to buy it in 1921; that he told plaintiff to offer defendant $65,000; that plaintiff reported to him that the offer had been refused and that an offer of $70,000 was then made, which was also refused; that plaintiff afterwards said that he could not do anything with defendant and would drop it; that plaintiff afterwards showed him other property which he did not buy, but afterwards he Deligiannis closed the deal with defendant for the property in question; that plaintiff afterwards asked him if he had closed the deal, and he said "Yes," and that plaintiff said, "'Well, he said, 'Don't you think I am entitled to a couple of hundred dollars for my services; I went a couple of times to see Mr. Waters.' I said, 'You didn't close the deal, so I don't see why I pay you a couple of hundred dollars for it,' and he said, 'Well, if you feel that way, it is all right.'" This witness also says that negotiations for the purchase of this property was opened with defendant by Deligiannis brothers in 1921.

The defendant testified that he first met Antonio Deligiannis in 1921, when he called in response to a letter which he received from the brothers and discussed this property with Antonio; that in December, 1923, he next saw Antonio at the office of his attorney. He says that when plaintiff called on

to buy this property, giving him a price of $65,000; that plain-
tiff came back and told him he could not buy it for $65,000, and
that Antonio told him to try and find another property. The
witness said that after the deal was closed he heard plaintiff
say to his brother that he (plaintiff) worked for the deal and
"you ought to give a few hundred dollars, two hundred dollars,
because you closed the deal directly with Mr. Waters."

Nicholas Dalginnis testified that before August 13,
1962, he asked plaintiff to try to buy this piece of property
and told him that they had tried to buy it in 1962; that he told
plaintiff to offer defendants $65,000; that plaintiff reported
to him that the offer had been refused and that an offer of
$67,000 was then made, which was also refused; that plaintiff
afterwards said that he could not do anything with defendants and
would drop it; that plaintiff afterwards showed him other property
which he did not buy, but afterwards he Dalginnis closed the deal
with defendant for the property in question; that plaintiff after-
wards asked him if he had closed the deal, and he said "Yes." and
that plaintiff said, "Well", he said, 'Jim's you think I am entitled
to a couple of hundred dollars for my services; I went a couple
of times to see Mr. Waters.' I said, 'You didn't close the deal,
so I don't see why I pay you a couple of hundred dollars for it.'
and he said, 'Well, if you feel that way, it is all right.' This
witness also says that negotiations for the purchase of this
property was opened with defendants by Dalginnis brothers in 1962.

The defendant testified that he first met Antonio
Dalginnis in 1962, when he called in response to a letter
that he received from the brothers and discussed this property
with Antonio; that in December, 1962, he met new attorney at the
office of his attorney. He says that when plaintiff called on

August 13, 1923, he told him that the property was owned by an estate; that it was for sale, if they could get their price, but that plaintiff would have to make the proposition to him; that he said that he (defendant) said, "All right. You put the proposition up in writing, and I will submit it to the other heirs;" that nothing was said about the payment of any commission; that plaintiff afterwards submitted an offer of $65,000, which defendant refused to submit to the heirs; that he afterwards was at his attorney's office, and that his attorney then told them what was wanted; that they would consider $85,000; that nothing was mentioned about commission, but it was stated, "We wanted $85,000 net; that didn't include the commission, bringing down the title, and the revenue stamps;" that plaintiff said that that was not the general practice of real estate men; that sellers were supposed to pay the commission, but that defendant they wanted $85,000 net; that plaintiff afterwards got in communication by telephone and wanted to know if they would open up the deal again, and defendant told him that the deal was absolutely closed; that they were through. The witness says that he did not at any time promise to pay the plaintiff any commission.

We think a preponderance of the evidence indicates that there was no contract of employment. The fact that negotiations for the purchase of this property had been opened between the parties two years before; that the whole transaction and conduct of the plaintiff is consistent with the theory that he was acting as the agent for the proposed purchasers instead of the vendors; that defendant was only a part owner of the property, and disclosed that fact to the plaintiff stating at different times that the propositions must be submitted to his

co-owners; that after the deal was closed plaintiff made a claim for commissions against the purchasers - all tend to corroborate the testimony of defendant to the effect that plaintiff was not employed to act either for defendant or the other owners of the property. Indeed, it may well be doubted whether the evidence of the plaintiff is sufficient to show prima facie the employment of the plaintiff. A preponderance of the evidence indicates that plaintiff was not employed by the defendant, and without a contract of employment, he is not entitled to recover. (Wilcox v. Andrews, 150 Ill. App. 27.)

For the reasons indicated the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, P. J., and Johnston, J., concur.

462 - 31613

LILLIAN GRACE McDONELL, Appellant,	)	APPEAL FROM CIRCUIT COURT,
v.	)	COOK COUNTY.
JAMES HARTNETT, Appellee.	)	241 I.A. 651

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is from an order entered by the Circuit Court on December 5, 1924, overruling the demurrer of Lillian Grace McDonell to the answer of James Hartnett, respondent, to a petition for a writ of assistance.

The petitioner elected to stand by her demurrer, and the order therefore dismissed her petition.

The respondent, James Hartnett, although himself an attorney practicing at this bar has not appeared in support of the order appealed from, and the appeal must therefore be decided without the benefit of his views as to the law applicable to the record.

The record discloses a bill filed to foreclose a trust deed on July 29, 1922. To this bill, James Hartnett, the maker of the trust deed, the Central Trust Co. of Illinois, as trustee, and Lillian Grace McDonell, who was alleged to have some interest subject to the lien of the trust deed, were made defendants. James Hartnett and Lillian Grace McDonell answered, she admitting the allegations of the bill of complaint and alleging that on June 20, 1918, she recovered in the Circuit Court of Cook County a judgment against the defendant Hartnett for $5,293 damages and $14.85 costs; that execution thereon was returned by the sheriff unsatisfied, and that the judgment was in full force and effect

and a valid lien upon the real estate described in the bill.

The cause was put at issue and referred to a master who reported in favor of the complainant finding the facts with reference to the judgment of June 20, 1918, as alleged by Lillian Grace McDonell.

On December 1, 1922, all the parties being represented by their solicitors, the court found that it had jurisdiction and ordered the master's report approved and further specifically found that Lillian Grace McDonell had a valid lien upon the real estate for the amount of her judgment. The decree entered in its details conforms to the act approved June 11, 1917, amending certain sections of the act approved March 22, 1872, in force July 1, 1872, as amended by subsequent acts with reference to sales of real estate under judgments and decrees, directed the master to execute the decree, and that immediately after the expiration of fifteen months after the date of certificate of indebtedness to be issued, the premises should be sold by the master in chancery, or by his successor in office, unless the same had been prior to that time redeemed.

On December 5, 1922, the master presented a report showing the issuing of a certificate of indebtedness to the complainant in accordance with the statute and decree, the filing of a duplicate of said certificate in the office of the recorder of Cook County, and on the same day an order was entered reciting notice to all the solicitors of the filing of the report and approving and confirming the same.

On April 29, 1924, the master filed his report of sale and distribution, dated April 25, 1924, reciting that on December 1, 1922, the premises had been duly redeemed by Lillian Grace McDonell as a judgment creditor in accordance with the provisions

and a valid lien upon the real estate described in the bill.

The cause was put at issue and referred to a master who reported in favor of the complainant finding the facts with reference to the judgment of June 20, 1922, as alleged by William Grace McDonell.

On December 1, 1924, all the parties being represented by their solicitors, the court found that it had jurisdiction and ordered the master's report approved and further specifically found that William Grace McDonell had a valid lien upon the real estate for the amount of her judgment. The decree entered in this chancery conformed to the not approved June 11, 1917, amending certain sections of the not approved March 22, 1872, in force July 1, 1872, as amended by subsequent acts with reference to sales of real estate under judgments and decrees, directed the master to execute the deeds, and that immediately after the expiration of fifteen months after the date of certificate of indebtedness to be issued, the premises should be sold by the master in chancery, or by his successor in office, unless the same had been paid to that time redeemed.

On December 5, 1924, the master presented a report showing the issuing of a certificate of indebtedness to the complainant in accordance with the statute and decree, the filing of a duplicate of such certificate in the office of the recorder of Cook County, and on the same day on order was entered directing notice to all the solicitors of the filing of the report and approving and confirming the same.

On April 22, 1926, the master filed his report of sale and distribution, dated April 22, 1926, showing that on December 1, 1925, the premises had been duly redeemed by William Grace McDonell as a judgment creditor in accordance with the provisions

of the statute; that the sheriff of Cook County on December 3, 1923, issued to her a certificate of redemption which was duly recorded on December 4, 1923; that the master had duly advertised the premises to be sold April 24, 1924, as per certificate of publication attached; that Lillian Grace McDonell bid $13,000 therefor and the master sold to her the said premises.

The master further reported the distribution of the sum realized from said sale in accordance with the terms of the decree showing a balance due on account of the principal of the certificate of $179.47.

On April 29, 1924, leave was given the defendants to file objections to the report within five days. The record fails to disclose, however, that any objections were filed, and an order was entered on May 7, 1924, that "no cause to the contrary having been shown," it was ordered that the report of the master be approved, ratified and confirmed in all respects.

On May 15, 1924, Hartnett was notified that on the next day the petition of Lillian Grace McDonell for a writ of assistance would be filed, and on May 16th, an affidavit and demand were filed showing that on May 9, 1924, one Glen A. Lloyd had exhibited to Hartnett the master's deed to Lillian Grace McDonell, dated April 24, 1924, covering the property described in the demand, and that a demand signed by Lillian Grace McDonell, and reciting the decree of December 1, 1922, the sale of the premises to Lillian Grace McDonell April 24, 1924, the issue of the master's deed to her, dated April 24, 1924, and that demand was made for immediate possession of the premises.

On the same day, Lillian Grace McDonell filed her verified petition, in which she set up the proceedings heretofore recited and prayed that a writ of assistance might issue directed

to the sheriff of Cook County, commanding him that he, without delay, proceed to put her in possession of the premises.

On May 20, 1924, James Hartnett, by his attorney, filed a demurrer to this petition, and after various dilatory proceedings, including a petition for a change of venue, which was granted, an order was entered on October 4, 1924, overruling the demurrer and directing Hartnett to answer the petition within five days.

Hartnett then answered setting up that at the time of the execution of the note and trust deed, he was owner of the premises described and resided upon the same and had an estate of homestead; that he was at that time the head of a family, residing with the same upon the premises, and thereby was a householder entitled to a homestead estate, which was exempted from sale for debt or other claim by force of the statutes of Illinois enacted by the legislature pursuant to the requirements of the constitution of Illinois; that in the trust deed he waived only the benefit of such exemption and homestead in favor of the holder of such security and of no other person, and that petitioner was not the person for whose benefit such waiver was made, and that at that time she was not a judgment creditor of respondent Hartnett; that if Lillian Grace McDonell is a judgment creditor of the respondent, she became such long after the execution of the trust deed, and under the law then and now in force, she had no right in the premises superior to respondent's homestead estate and exemption, and was not entitled to a writ of assistance to dispossess respondent and his family.

Hartnett, as respondent, further answered that the act of 1917, amending the statute then in effect relating to judgments, decrees and executions, if given the construction for which the

[illegible] the county of Cook County, commanding him that he, without delay, proceed to put her in possession of the premises.

On May 30, 1924, James Burkett, by his attorney, filed a response to this petition, and after various dilatory proceedings, including a petition for a change of venue, which was granted, an order was entered on October 4, 1924, overruling the demurrer and directing Burkett to answer the petition within five days.

Burkett then denied setting up that at the time of the execution of the note and trust deed, he was owner of the premises described and resided upon the same and had an estate of homestead; that he was at that time the head of a family, residing with the same upon the premises, and thereby and a beneficiary entitled to a homestead estate, which was exempted from sale for any or other claim by force of the statutes of Illinois exempted by the legislature pursuant to the requirements of the constitution of Illinois; that in the trust deed he waived only the benefit of the exemption and homestead in favor of the holder of such security and of no other person, and that petitioner was not the person for whose benefit such waiver was made, and that at that time she was not a judgment creditor of respondent Burkett; that petitioner never became a judgment creditor of the respondent, nor became such long after the execution of the trust deed, and after the lien thereof was in force, she had no right in the premises superior to respondent's homestead estate and exemption, and was not entitled to a writ of mandamus to dispossess respondent and his family.

Burkett, as respondent, further answered that she not "1917, amending the statute then in effect relating to judgments, liens and executions, it gives the constitution for which the

petitioner contended, was wholly unconstitutional and void because the act so enforced was in derogation of the vested rights of petitioner, of which the General Assembly and the judicial department of the state could not deprive petitioner or interfere therewith, as such right of homestead estate and exemption was protected by the particular provisions of the bill of rights of the Illinois constitution and of the fourteenth amendment to the federal constitution.

The answer of the respondent also averred that the General Assembly enacted the homestead and exemptions statute pursuant to provisions of the constitution of Illinois, and that the petitioner had not brought herself within the terms of such statute whereby the homestead estate could be taken or acquired by petitioner, because she had failed to proceed in the manner prescribed by the statute.

The answer of the respondent referred to the files and records in the cause, which he said would show that the petitioner had failed to take all steps required by the statute and had failed to comply with its requirements. That the omitted steps or requirements are, the answer did not state, but alleged that the purported sale, upon which the petitioner relied, was null and void "because of defects appearing therein."

Further the answer of respondent Hartnett denied the jurisdiction of the court to enforce the claim or demand of the petitioner.

From the order sustaining the demurrer of the petitioner, Lillian Grace McDonell, to that answer, this appeal is prosecuted. In the absence of an appearance or brief by the respondent appellee, this court is left wholly without information, as we have already said, of the rules of law upon which he relies, and the court very

petitioner contended, was wholly unconstitutional and void because it was not authorized nor in derogation of the vested rights of petitioner, of which the General Assembly and the judicial department of the state could not deprive petitioner or interfere therewith, as such right of homestead estate and exemptions was protected by the particular provisions of the bill of rights of the Illinois constitution and of the fourteenth amendment to the federal constitution.

The answer of the respondent also averred that the General Assembly created the homestead and exemptions estate mentioned in pursuance of the constitution of Illinois, and that the petitioner had not brought himself within the terms of such statutes whereby the homestead estate could be taken or acquired by petitioner, because she had failed to be present in the manner prescribed by the statute.

The answer of the respondent referred to the files and records in the court, which he said would show that the petitioner had failed to take all steps required by the statutes and had failed to comply with the requirements. Then the petitioner alleged in replication, the answer did not state, and claimed that the purported sale, upon which the petitioner relied, was a sale "because of their erroneous invoice." Further the answer of respondent further denied the jurisdiction of the court to enforce the claim or demand of the petitioner.

From the order sustaining the demurrer of the petitioner, within three months, to that answer, this appeal is prosecuted. In the absence of an ordinance or right by the legislature creating this court in part really without jurisdiction, as we have already said, of controlling of law upon which he relies, and the only way

much regrets the necessity of deciding this case without such assistance.

Indeed, the suggestion of the petitioner and appellant that the real purpose of the opposition to the writ of assistance was and is to enable an insolvent lawyer to enjoy the petitioner's property, rent free, as long as possible, under all the circumstances which appear in this record, seems quite plausible. The indefinite answer of the respondent would seem to indicate that the theory of his opposition is that the waiver of the right of homestead in the trust deed was made for the benefit of the holder of the trust deed alone and not for the benefit of one who thereafter might become a judgment creditor. If that is the theory upon which respondent relies, it is only necessary to point out that, in a long line of decisions by the highest court of this state, it has been held that such a defense is unavailing. (Smith v. Mace, 137 Ill. 68, Herdman v. Cooper, 138 Ill. 583; Schroeder v. Bauer, 140 Ill. 135; Oldfield v. Bulert, 148 Ill. 617; Butler v. Brown, 205 Ill. 606; Sutherland v. Long, 273 Ill. 309.)

All these cases in substance hold that a judgment creditor redeeming from a prior sale does not simply remove an encumbrance out of the way of his execution, but that on the contrary a title acquired at an execution sale upon redemption by a junior judgment creditor relates back to the judgment from which the redemption is made, and is paramount to any title acquired subsequent to the beginning of the lien of that judgment; that by failing to redeem from the sale under the decree of foreclosure within the time allowed by law, the mortgagor loses all right to redeem, and that when he fails to make such redemption, his rights are gone.

We are not aware of any statute of the state or decision of the courts changing this rule, and if such exist,

we deem it the duty of this lawyer defendant to point out the same to the court. In the absence of any assistance from the respondent, this court will not embark upon a voyage of discovery.

The order is reversed and the cause remanded with directions to the trial court to sustain the demurrer of petitioner to the answer.

REVERSED AND REMANDED
WITH DIRECTIONS.

McBurnely, P. J., and Johnston, J., concur.

350 - 31482

HIRAM A. WHITMAN, Appellant, vs. ACME X-RAY COMPANY, a Corporation, and ACME INTERNATIONAL X-RAY COMPANY, a Corporation, Appellees.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by Hiram A. Whitman, the plaintiff, against the Acme X-Ray Company, a corporation, and the Acme International X-Ray Company, a corporation, the defendants, to recover $1500 with interest at five per cent. as salary alleged to be due to the plaintiff from the defendants for the last six months of his employment by the defendants under a written contract, covering a period of two years.

The case was tried before a court and a jury. The jury returned a verdict against the plaintiff and the court entered judgment on the verdict. From the judgment the plaintiff has prosecuted the present appeal.

The contract was entered into originally between the plaintiff and the defendant, the Acme X-Ray Company. The parties in control of that company subsequently organized the Acme International X-Ray Company, which assumed all of the obligations and liabilities of the Acme X-Ray Company.

One of the principal grounds on which the plaintiff asks for a reversal is that the verdict is manifestly against the weight of the evidence.

The bill of exceptions does not contain a motion for a new trial; and counsel for the defendants invoke the rule that if the bill of exceptions does not contain a motion for a new trial, the question of the sufficiency of the evidence cannot be reviewed.

Greenwell v. Hess, 298 Ill. 459, 462; Whitely v. Rule, 230 Ill. App. 218, 220; Briggs v. Page, 222 Ill. App. 223, 224, 226.

We have examined the evidence, however, and we are of the opinion that the verdict of the jury is not manifestly against the weight of the evidence. The services which the plaintiff agreed to perform by the terms of the contract related to taking charge of the financial operations and matters under the control of the board of directors of the company; to assisting the company in its business negotiations, leases and purchases; to aiding the company in raising capital for conducting and expanding the business; to advising and consulting with the General Manager and Production Manager, and to reporting to the board of directors as needs might require "in regard to the projects and enterprises of the company;" and to devising ways and means of "meeting same and all extraordinary undertakings." It is contended by counsel for the plaintiff that the only defense presented by the defendants on the evidence is that the plaintiff refused to sell stock. We think that this contention is not correct. In our view of the evidence there is ample evidence on behalf of the defendants, independently of the question of the sale of stock, to support the verdict of the jury. On a consideration of all of the evidence we do not feel inclined to disturb the verdict of the jury. According to the familiar rule, it is the special province of the jury to determine the credibility of the witnesses, and the probability or improbability of their testimony; and a court of reviewwill not interfere with the verdict unless it is manifestly against the weight of the evidence. Hale Elevator Co. v. Hale, 201 Ill. 131, 146.

Counsel for the plaintiff further contend that the judgment should be reversed because of prejudicial remarks made by the trial judge.

This objection has not been preserved for review for

[illegible]well v. Lane, 280 Ill. 480, 482; Whitely v. Dale, 290 Ill. App. [illegible], 290; Williams v. Pace, 227 Ill. App. 293, 294, 298.

We have examined the evidence, however, and we are of [illegible] opinion that the verdict of the jury is not manifestly against the weight of the evidence. The services which the plaintiff agreed to perform by the terms of the contract related to making, charge of the financial operations and matters under the control of the board of directors of the company; to assisting the company in its business negotiations, finance and purchases; to aiding the company in raising capital for manufacturing and expanding the business; to visiting and consulting with the General Manager and Production Manager, and to reporting to the board of directors as needs might require; to be responsible to the board of directors as needs might require; and to be responsible to the president and secretary of the company; to devising ways and means of "accepting some and all extraordinary undertakings." It is contended by counsel for the plaintiff that the only defense presented by the defendants on the evidence is that the plaintiff refused to sell stock. We think that this contention is not correct. In our view of the evidence there is ample evidence on behalf of the defendants, independently of the question of the sale of stock, to support the verdict of the jury. On a consideration of all of the evidence we do not feel inclined to disturb the verdict of the jury. According to the familiar rule, it is the exclusive province of the jury to determine the credibility of the witnesses, and the probability or improbability of their testimony; and a court of review will not interfere with the verdict unless it is manifestly against the weight of the evidence. Hale Elevator Co. v. Hale, 202 Ill. 193, 196.

Counsel for the plaintiff further contend that the [illegible] should be reversed because of prejudicial remarks made by the trial judge. [illegible]

The objection was not then preserved for review for

the reason that the record does not show that exceptions were taken by the defendant to the remarks of the court. Public Service Co. v. Leatherbee, 311 Ill. 505, 508. We have considered the objection, however, and we think that the remarks would not justify us in reversing the judgment. The remarks are as follows:
"The Court: I read it [the contract] two or three times. I am assuming that a sale of stock was like a sale of everything else. He was to furnish the brains to finance this concern, whether it was by stock, or by some other way; that was up to him. Now, let us see what the efforts were." Counsel for the plaintiff maintains that the contract makes no reference to the sale of stock as one of the duties of the plaintiff; that "had it been the intention of the parties to the contract that one of the duties of plaintiff was to sell stock of the company, certainly the contract would have so stated in clear and unambiguous terms;" that the remarks of the court "plainly informed the jury that the court construed the contract to require plaintiff as one of his obligations under the contract to sell stock of the new company."

It is true that the contract does not specifically provide that the plaintiff should sell stock as one of his duties. We think, however, that on a fair, reasonable interpretation of the contract one of the duties of the plaintiff was the sale of stock.

Counsel for the plaintiff further contend that the court committed reversible error in giving the following instruction at the request of the defendants:

> "The jury are further instructed as a matter of law, that the undertaking of the plaintiff in his contract with the defendant, Acme X-Ray Company, is an entire undertaking, that is to say that the plaintiff is required to have performed his entire contract up to the date of the termination thereof, and if you find he has so performed them he is entitled to the entire consideration for the last six (6) months thereof, that is to say, Fifteen Hundred Dollars ($1500), but if you find from the evidence that during the last six (6) months of the term of the plaintiff's contract he failed or refused to fully

the terms that the record does not show that assignments were taken by the defendant in the remainder of the notes. Public Service Co. v. Lagerquist, 221 Ill. 209, 209. We have considered the objection, however, and we think that the remarks would not justify us in reversing the judgment. The remarks are as follows:

"The Court: I read it [the contract] two or three times. I am assuming that a sale of stock was like a sale of everything else. He was to furnish the brains to finance this concern, whether it was by stock, or by some other way; that was up to him. Now, let us see what the efforts were." Counsel for the plaintiff maintains that the contract makes no references to the sale of stock as one of the duties of the plaintiff; that "had it been the intention of the parties to the contract that one of the duties of plaintiff was to sell stock of the company, certainly the contract would have so stated in clear and unmistakable terms;" that the remarks of the court "plainly informed the jury that the court construed the contract to require plaintiff as one of his obligations under the contract to sell stock of the new company."

It is true that the contract does not specifically provide that the plaintiff should sell stock as one of his duties. We think, however, that on a fair, reasonable interpretation of the contract one of the duties of the plaintiff was the sale of stock.

Counsel for the plaintiff further contend that the court committed reversible error in giving the following instruction at the request of the defendants:

"The jury are further instructed as a matter of law, that the undertaking of the plaintiff in his contract with the defendant, Home Sugar Company, is an entire undertaking, that is to say that the plaintiff is required to have performed his entire contract up to the term of the termination thereof, and if you find he has so performed then he is entitled to the entire consideration for the last six (6) months thereof, that is to say, fifteen hundred dollars ($1500), but if you find from the evidence that during the last six (6) months of the term of the plaintiff's contract he failed or refused to fully

perform the duties required of him under his contract, that then the plaintiff is not entitled to recover anything even though it may appear from the evidence that he performed a portion of the duties, and your finding shall be for the defendants."

As the instruction is not incorporated in the bill of exceptions, the plaintiff is not entitled to have the error assigned on the instruction reviewed on appeal. (The People v. Nelson, 320 Ill. 270, 280, 281; Greenwell v. Hess, 298 Ill. 459, 462, 463). However, we do not think that the instruction is erroneous.

The grounds of the objection of counsel for the plaintiff to the instruction are stated in their brief as follows:

"Here the court instructs the jury that if the plaintiff failed or refused to fully perform the duties required of him under his contract, then the plaintiff is not entitled to recover anything, even though it may appear from the evidence that he performed a portion of the duties, and your findings shall be for the defendants. Here the court in substance and effect instructs the jury to find the issues for the defendants if he failed to sell stock."

We think that the plaintiff was obligated to perform all of the duties required of him under the contract.

In our view, the instruction does not direct the jury in substance and effect to find the issues for the defendants if they believe that the plaintiff failed to sell stock. We are of the opinion that the sale of stock was one of the duties of the plaintiff contemplated by the contract, but the instruction does not specifically refer to that question, nor is there anything in the instruction from which reasonably it could be inferred that the finding of the jury should be dependent on that question alone. The instruction merely refers generally to the duties required of the plaintiff under the contract.

For the reasons stated the judgment of the court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

performs the duties required of him under his contract, that then the plaintiff is not entitled to recover anything even though it may appear from the evidence that he performed a portion of the duties, and your finding shall be for the defendants."

As the instruction is not incorporated in the bill of exceptions, the plaintiff is not entitled to have the error assigned on the instruction revieved on appeal. (The Peonia v. Williams, 180 Ill. 470, 480, 483; Greenwell v. Hess, 198 Ill. 478, 481, 482). However, we do not think that the instruction is erroneous.

The grounds of the objection of counsel for the plaintiff to the instruction are stated in their brief as follows:

"Here the court instructs the jury that if the plaintiff failed or refused to fully perform the duties required of him under his contract, then the plaintiff is not entitled to recover anything, even though it may appear from the evidence that he performed a portion of the duties, and your finding must be for the defendants. Here the court in substance and effect instructs the jury to find the issues for the defendants if he failed to call stock."

We think that the plaintiff was obligated to perform all of the duties required of him under the contract.

In our view, the instruction does not direct the jury to disregard and refuse to find the issues for the defendants if they believe that the plaintiff failed to call stock. We are of the opinion that the sale of stock was one of the duties of the plaintiff contemplated by the contract, but the instruction does not specifically refer to that question, nor is there anything in the instruction from which reasonably it could be inferred that the finding of the jury should be dependent on that question.

The instruction merely refers generally to the duties required of the plaintiff under the contract.

For the reasons stated the judgment of the court is affirmed.

AFFIRMED.

Mr. Justices Y., Y., and McBride, J., concur.

381 - 31513

INEZ I. TINSLEY, Appellee, vs. W. O. DICE, Appellant.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by W. O. Dice, the defendant, from a judgment on the verdict of a jury in the sum of $3500 in favor of Ines I. Tinsley, the plaintiff, in an action brought by the plaintiff to recover damages for injuries sustained in a collision between an automobile, in which the plaintiff was riding as a guest, and a motor truck owned by the defendant and driven by a chauffeur of the defendant.

The undisputed evidence shows that the accident occurred in the afternoon of May 2, 1924, near the intersection of 71st street and Parnell avenue, public thoroughfares in the City of Chicago; that 71st street runs in an easterly and westerly direction, and Parnell avenue runs in a northerly and southerly direction; that the plaintiff was riding in an automobile by invitation of the owner of the automobile; that the automobile was going east on the south side of 71st street; that the motor truck was going west on the north side of 71st street; that there is an alley which runs in a northerly and southerly direction about 100 feet west of the intersection of 71st street and Parnell avenue; that about 100 feet west of the alley there is a railroad viaduct which crosses 71st street; that the collision occurred at the alley; that the automobile in which the plaintiff was riding was being driven at the rate of about 22 miles an hour at the time of the collision; that the motor truck was going at the rate of 3

4 miles an hour; that as the motor truck turned south to go into the alley to deliver some merchandise the collision occurred; that at the time the motor truck turned to go into the alley the driver of the motor truck gave no warning either by sounding his horn or extending his arm; that the plaintiff was injured in the collision; that four of her ribs were fractured about 2 to 4 inches from the spine, and that one of the four ribs was fractured in two places; that the plaintiff was black and blue from her knee to her shoulder; that her back and entire right side were black from bruises; that she remained in a hospital for one week; that she was then taken in an ambulance to her home, where she remained in bed until May 30, 1924; that the discoloration on her hip and back did not disappear until July, 1924; that she suffered great pain; that she was attended by a physician for 5 or 6 weeks after she left the hospital; that during that time her back was bandaged; that she still has pain in her right side; that she has had pain for over a year, especially when the weather is bad; that when she does housework her back begins to hurt and she has to stop and that this condition continued up to the time of the trial, namely, March 4, 1926; that prior to the accident she had no trouble with her back or right side; that the ligaments of her spine are sore and if they are strained and restrained they may get worse instead of better.

There is some conflict between the testimony of the chauffeur of the automobile and the chauffeur of the motor truck as to the facts surrounding the immediate happening of the collision.

The chauffeur of the automobile testified on behalf of the plaintiff that as he passed from under the viaduct he noticed the motor truck; that the motor truck was about at Parnell avenue; that the motor truck continued to go west and that he continued to go east; that he was watching the alley for trucks that might come

out of there; that as he got up to about 2 feet of the alley he noticed the motor truck cut right in south; that he was about 5 feet from the motor truck; that he wanted to go over to the curb to get away from the motor truck; that he got about a half a foot from the south curb, but did not get on the curb before the accident happened; that he did not blow his horn or give any warning; that he did not put his brakes on, "as I figured he [the chauffeur of the motor truck] was going to let me through;" that he thought he could get past the motor truck as it was going slowly; that he thought the chauffeur of the motor truck was waiting for him to go through; that the motor truck did not stop or decrease its speed; that if the motor truck had continued at the same speed it would not have touched him; that the motor truck must have increased its speed.

The chauffeur of the motor truck testified on behalf of the defendant that when he first saw the automobile in which the plaintiff was riding it was about 120 to 130 feet from the scene of the accident, and that he was about 8 feet from the alley; that when he next saw the automobile it was about 75 or 100 feet away; that he did not look at the automobile again until it was about 12 feet away; that between the time the automobile was about 75 feet away he did not see it until it was right up to him; that he thought it would stop and paid no further attention to it, and he kept right on going; that at the time of the collision he was "absolutely at a standstill."

One of the principal grounds urged for reversal of the judgment by counsel for the defendant is that the verdict is against the weight of the evidence; that "the record completely fails to disclose any act of negligence on the part of the defendant."

In our opinion there is ample evidence to sustain a

finding that the defendant was guilty of negligence. In considering this question it must be borne in mind that the motor truck of the defendant was driving west on the north side of 71st street and that the chauffeur of the automobile in which the plaintiff was riding was driving east on the south side of 71st street; in other words, the two vehicles were approaching each other from opposite directions. In this situation it was clearly a question of fact for the jury whether the defendant's chauffeur, in starting to enter the alley, was negligent in turning south directly across the path of the automobile in which the plaintiff was riding without either sounding his horn, extending his arm, or otherwise giving warning. Furthermore, it was also a question of fact for the jury whether, in the circumstances shown by the evidence, it was negligence on the part of the defendant's chauffeur to start to turn into the alley, instead of remaining on the north side of 71st street until the automobile in which the plaintiff was riding had passed.

On consideration of all of the evidence we are of the opinion that the verdict of the jury is not manifestly against the weight of the evidence.

Counsel for the defendant further contends that on the undisputed evidence the plaintiff was guilty of contributory negligence as a matter of law.

The evidence shows that the plaintiff did nothing actively to prevent the collision; that she remained passive. The plaintiff testified as follows: "I knew the driver Mat and felt safe under his direction of the car and I relied upon him."

The test as to what constitutes contributory negligence as a matter of law is defined in the case of Kelly v. Chicago City Ry. Co., 283 Ill. 640, as follows (p. 645):

> "As a general proposition, the question of contributory negligence is one of fact for the jury under all the facts and circumstances shown by the evidence, (Bale v. Chicago Junction Railway Co., 259 Ill. 476) but cases occasionally arise in which

finding that the defendant was guilty of negligence. In remanding the question it must be borne in mind that the motor truck of the defendant was driving west on the north side of 71st street and that the chauffeur of the automobile in which the plaintiff was riding was driving east on the south side of 71st street; in other words, the two vehicles were approaching each other from opposite directions. In this situation it was clearly a question of fact for the jury whether the defendant's chauffeur, in attempting to enter the alley, was negligent in turning south directly across the path of the automobile in which the plaintiff was riding without either sounding his horn, extending his arm, or otherwise giving warning. Furthermore, it was also a question of fact for the jury whether, in the circumstances shown by the evidence, it was negligence on the part of the defendant's chauffeur to start to turn into the alley, instead of remaining on the north side of 71st street until the automobile in which the plaintiff was riding had passed.

In consideration of all of the evidence we are of the opinion that the verdict of the jury is not manifestly against the weight of the evidence.

Counsel for the defendant further contends that on the undisputed evidence the plaintiff was guilty of contributory negligence as a matter of law.

The evidence shows that the plaintiff did nothing actively to prevent the collision; that she remained passive. The plaintiff testified as follows: "I knew the driver but and felt safe under his direction of the car and I relied upon him."

The test as to what constitutes contributory negligence as a matter of law is defined in the case of Kelly v. Chicago City Ry. Co., 255 Ill. 610, as follows (p. 622):

"As a general proposition, the question of contributory negligence in one of fact for the jury under all the facts and circumstances shown by the evidence. (Kelly v. Chicago Junction Railway Co., 250 Ill. 476) but cases occasionally arise in which

a person is so careless or his conduct so violative of all rational standards of conduct applicable to persons in a like situation that the court can say, as a matter of law, that no rational person would have acted as he did and render judgment for the defendant."

In our view we cannot say as a matter of law that no rational person would have acted as the plaintiff did.

We are of the opinion that the questions whether the plaintiff should have been so watchful and vigilant that she could have discovered the danger of the collision in time to warn the chauffeur and prevent the collision; or whether she was justified in remaining passive and relying on the chauffeur, are questions of fact for the jury.

Counsel for the defendant further contends that the court erred in giving the following instruction on behalf of the plaintiff;

"If you believe from the evidence that any witness in this case has knowingly, wilfully, intentionally or falsely testified as to any matter or thing material to the issues in this case, then you are at liberty to entirely reject the testimony of such witness except in so far as it is corroborated, if it is corroborated, by other credible evidence, or by facts and circumstances appearing in evidence."

The objection of counsel for the defendant to the instruction is that the word "or" after the word "intentionally" "gave the jury free reign to regard or disregard the evidence of a witness as they might see fit." It is evident that the word "or" was inadvertently inserted after the word "intentionally" and that the instruction should have read, "If you believe from the evidence that any witness in this case has knowingly, wilfully or intentionally, falsely testified," etc.

We think that the jury were not misled by the instruction. We would not impute such lack of intelligence to the jury as to presume that they assumed under the instruction that they had a right to "regard or disregard" the testimony of witnesses who they believed had testified "knowingly, wilfully, intentionally" to the facts. Such an interpretation of the instruction would

a person is so careless or his conduct so violative of all rational standards of conduct applicable to persons in a like situation that the court can say, as a matter of law, that no rational person would have acted as he did and render judgment for the defendant."

In our view we cannot say as a matter of law that no rational person would have acted as the plaintiff did.

We are of the opinion that the questions whether the plaintiff should have been so watchful and vigilant that she could have discovered the danger of the collision in time to warn the chauffeur and prevent the collision; or whether she was justified in remaining passive and relying on the chauffeur, are questions of fact for the jury.

Counsel for the defendant further contends that the court erred in giving the following instruction on behalf of the plaintiff:

"If you believe from the evidence that any witness in this case has knowingly, willfully, intentionally or falsely testified as to any material matter in the issues in this case, then you are at liberty to entirely reject the testimony of such witness except in so far as it is corroborated, if it is corroborated, by other credible evidence, or by facts and circumstances appearing in evidence."

The objection of counsel for the defendant to the instruction is that the word "or" after the word "intentionally" gives the jury free rein to regard or disregard the evidence of a witness as they might see fit." It is evident that the word "or" was inadvertently inserted after the word "intentionally" and that the instruction should have read, "If you believe from the evidence that any witness in this case has knowingly, willfully or intentionally, falsely testified," etc.

We think that the jury were not misled by the instruction. We would not impute such lack of intelligence to the jury as to presume that they assumed under the instruction that they had a right to "regard or disregard" the testimony of witnesses who they believed had intentional "knowingly, willfully, intentionally" to the facts. Even an interpretation of the instruction would

have been absurd.

Counsel for the defendant further contends that the court erred in giving the following instruction on behalf of the plaintiff:

> "You are instructed that if you believe from the preponderance of the evidence, under the instructions of the court, that the plaintiff was in the exercise of ordinary care for her own safety at and just prior to the occurrence of the accident in question, and if you further believe from the preponderance of the evidence, under the instructions of the Court, that the defendant W. O. Dice's servant was guilty of any negligence alleged in the plaintiff's declaration, or any count thereof, which caused or proximately contributed to cause the accident and alleged injuries to the plaintiff, then your verdict should be for the plaintiff even though you might also believe from the evidence that the driver of the automobile in which plaintiff was riding at the time and place in question was also guilty of some negligence proximately contributing to bring about the accident and injuries to the plaintiff."

It is maintained by counsel for the defendant that this instruction "assumes that the plaintiff was in the exercise of ordinary care, whereas there is no evidence in the record that plaintiff did exercise ordinary care;" that further it assumes that the plaintiff "by reason of the fact that she was riding in an automobile driven by another entirely relieved plaintiff from exercising ordinary care for her own safety."

We think that the instruction obviously is not reasonably susceptible of the constructions which counsel for the defendant places on it.

It is further objected by counsel for the defendant that the court erred in instructing the jury that in estimating the plaintiff's damages they had the right to take into consideration "such future suffering and loss of health if any;" and "her loss of time and inability to work, if any;" and that "there is no evidence in this record as to either of these propositions."

We think that there is sufficient evidence to justify the instruction. Furthermore, the qualifying phrase "if any" is used in the instruction. Again, the first paragraph of the instruction is as follows: "The jury are instructed that if from a

preponderance of the evidence and under the instructions of the Court, you find the defendant guilty, as alleged in the declaration, then you will be required to determine the amount of plaintiff's damages, if any, so far as such damages as are alleged in her declaration are established by a preponderance of the evidence, if you find they are so established."

Counsel for the defendant further contends that the court committed reversible error in refusing to give the following instruction on behalf of the defendant:

> "If you believe, from all the evidence in this case, that the motor vehicle in which the plaintiff was riding at the time in question was being driven on a public street in the City of Chicago, in violation of the statutes of Illinois regulating the traffic of vehicles upon public streets and highways; and if you further believe from all of the evidence, that the plaintiff knew, or in the exercise of ordinary care on her part could have known of such violation of the law by the driver of the vehicle she was riding in a sufficient length of time before the collision here in question to have cautioned the driver of the automobile plaintiff was riding in not to violate said statutes, or to have prevented said driver from violating said statutes; then the Court instructs you that so driving said vehicle in which plaintiff was riding contrary to said statutes, raises the presumption that the plaintiff and the driver of the motor vehicle in which plaintiff was riding, at the time and place in question, were, as a matter of law, guilty of negligence; and if you further believe from the evidence that such negligence was the proximate cause of the injury to the plaintiff, without which the injury would not have happened, then you should find the defendant not guilty."

We think that the instruction is objectionable for several reasons. It assumes as a matter of law that there was a duty on the part of the plaintiff to caution the chauffeur not to violate the statute or to prevent the chauffeur from violating the statute, whereas the question of the duty of the plaintiff in these respects was one of fact. Furthermore, the instruction does not inform the jury what facts must exist and what speed must be exceeded in order to create a prima facie case of negligence; nor does it tell the jury under what conditions the prima facie case of negligence may be rebutted by the plaintiff. In the instruction numbered 15, given at the request of the defendant, the jury were properly instructed in regard to the statute in question;

preponderance of the evidence and under the instruction of the court, you find the defendant guilty, as alleged in the declaration, then you will be required to determine the amount of plaintiff's damages, if any, so far as such damages as are alleged in her declaration are established by a preponderance of the evidence, if you find they are so established."

Counsel for the defendant further contends that the court committed reversible error in refusing to give the following instruction on behalf of the defendant:

"If you believe, from all the evidence in this case, that the motor vehicle in which the plaintiff was riding at the time in question was being driven on a public street in the City of Chicago, in violation of the statutes of Illinois regulating the traffic of vehicles upon public streets and highways; and if you further believe from all of the evidence, that the plaintiff knew, or in the exercise of ordinary care on her part could have known of such violation of the law by the driver of the vehicle she was riding in a sufficient length of time before the collision here in question to have constrained the driver of the automobile plaintiff was riding in not to violate said statutes, or to have prevented said driver from violating said statutes; then the court instructs you that by riding said vehicle in which plaintiff was riding contrary to said statutes, raises the presumption that the plaintiff and the driver of the motor vehicle in which plaintiff was riding, at the time and place in question, were, as a matter of law, guilty of negligence; and if you further believe from the evidence that such negligence was the proximate cause of the injury to the plaintiff, without which the injury would not have happened, then you should find the defendant not guilty."

We think that the instruction is objectionable for several reasons. It assumes as a matter of law that there was a duty on the part of the plaintiff to caution the chauffeur not to violate the statute or to prevent the chauffeur from violating the statute, whereas the question of the duty of the plaintiff in these respects was one of fact. Furthermore, the instruction does not inform the jury what facts must exist and what speed must be exceeded in order to create a prima facie case of negligence; nor does it tell the jury under what circumstances the prima facie case of negligence may be rebutted by the plaintiff. In the instruction mentioned is, given at the request of the defendant, the jury were erroneously instructed in regard to the statutes in question;

and in the instruction numbered 18, given at the request of the defendant, the jury were instructed to find the defendant not guilty if "the sole cause of the injury to the plaintiff" was due to the negligent operation of the automobile in which the plaintiff was riding.

Counsel for the defendant further contends that the court erred in refusing to give the following instruction which the defendant requested be given:

> "The court instructs the jury that the burden is upon the plaintiff to show by a preponderance of the evidence that she was in the exercise of ordinary care just before and at the time of the alleged accident. And the Court instructs you that she is not relieved from that duty because she was riding in an automobile, but the law is that where a passenger in an automobile has an opportunity to learn of danger and void it, it is her duty to warn the driver of the automobile of such danger."

We think the instruction is erroneous in that it assumes as a matter of law that it is the duty of a passenger in an automobile, who knows of a danger, to warn the chauffeur of the danger. The duty of a passenger in this respect depends upon the facts in the particular case. It may be that in some circumstances it would be unwise for the passenger to interfere with the chauffeur at all, as the chauffeur might be confused or excited by such interference; in other circumstances it might be reasonable and proper for a passenger to warn the chauffeur of a danger. In our opinion the question is not one of law but of fact. Hegner v. Kindcek, No. 30529, opinion of the 3rd Division of the Appellate Court, not yet reported.

It is objected by counsel for the defendant that the verdict is excessive. We think that it is not necessary to discuss the evidence relating to this question. We have stated the evidence in this regard, and we are of the opinion that it is sufficient to support the verdict.

For the reasons stated the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

[illegible]d in the instruction numbered 13, given at the request of the [illegible]fendant, the jury were instructed to find the defendant not [illegible]uilty if "the sole cause of the injury to the plaintiff was [illegible]due to the negligent operation of the automobile in which the [illegible]laintiff was riding.

Counsel for the defendant further contends that the [illegible]court erred in refusing to give the following instruction which [illegible]the defendant requested be given:

"The court instructs the jury that the burden is upon the plaintiff to show by a preponderance of the evidence that she [illegible] in the exercise of ordinary care just before and at the time of the alleged accident. And the Court instructs you that she is not relieved from that duty because she was riding in an automobile, but the law is that where a passenger in an automobile has an opportunity to learn of danger and void it, it is her duty to warn the driver of the automobile of such danger."

We think the instruction is erroneous in that it assumes as a matter of law that it is the duty of a passenger in an automobile, who knows of a danger, to warn the operator of the danger. The duty of a passenger in this respect depends upon the facts in the particular case. It may be that in most circumstances it would be unwise for the passenger to interfere with the operator at all, as the operator might be confused or excited by such interference; in other circumstances it might be reasonable and proper for a passenger to warn the operator of a danger. In our opinion the question is not one of law but of fact. Hamner v. Sinclair, Mo. 30SW2, opinion of the 3rd Division of the Kansas City Court, not yet reported.

It is objected by counsel for the defendant that the evidence is cumulative. We think that it is not necessary to discuss the evidence relating to this question. We have stated the evidence in this record, and we are of the opinion that it is sufficient to support the verdict.

For the reasons stated the judgment is affirmed.

AFFIRMED.

Barnett, P. J., and Hatchett, J., concur.

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HARVEY L. CAVENDER and WILLIAM E. KAISER, Copartners as CAVENDER & KAISER, Appellants, vs. JULIUS BECKER, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Harvey L. Cavender and William E. Kaiser, attorneys and copartners, the plaintiffs, from an order in a proceeding under section 21 of the Municipal Court act, vacating a judgment in the sum of $600.02 entered in favor of the plaintiffs in an action brought by the plaintiffs against Julius Becker, the defendant, to recover attorney's fees for services alleged to have been rendered to the defendants by the plaintiffs.

In the original action for attorney's fees the defendant filed an affidavit of merits sworn to by the defendant, denying that the itemized statement of services in the plaintiffs' statement of claim alleged to have been rendered to the defendant was correct, and denying that the plaintiffs expended the court costs and moneys set forth in the plaintiffs' statement of claim. Thereafter the defendant filed an amended affidavit of merits sworn to by his then attorney, admitting that the itemized statement of court costs and moneys expended for the plaintiffs, as set forth in plaintiffs' statement of claim, was correct except as to four items.

The case was reached for trial on September 25, 1925, and was several times continued until November 6, 1925, when the defendant having failed to appear, judgment in the sum of $600 was entered on the verdict of a jury against the defendant.

On December 5, 1925, the defendant filed a motion to vacate the judgment, and in support of the motion the defendant

filed an affidavit in which, among other things, he alleged that he was not advised that the case was set for trial on November 6, 1925; that his attorney had agreed with the plaintiffs in September to have the case set for trial at "a later date," but that the attorney failed to notify him of the date; that his attorney "did not appear in court at any later date but threw his case."

On December 28, 1925, the court entered an order vacating the judgment. On January 5, 1926, the case was upon the trial call and was continued until February 16, 1926, for the reason that the defendant was not ready for trial. On February 16, 1926, the case was continued to March 2, 1926, and on March 2, 1926, it was continued until March 25, 1926. The defendant was present in court on January 5, 1926, February 16, 1926, and March 2, 1926, and March 16, 1926. On March 25, 1926, the defendant did not appear in court and on motion of the plaintiffs the case was continued until April 9, 1926. On April 9, 1926, the defendant having failed to appear, a judgment in the sum of $600.02 was entered against the defendant on a verdict of the jury.

On July 14, 1926, the defendant filed a petition under section 21 of the Municpal Court act, being the present proceeding, to vacate the judgment entered on April 9, 1926.

The petition which was sworn to by the defendant is as follows:

"Now come the petitioner, Julius Becker, defendant in the above entitled cause, and prays to this Honorable Court that the judgment entered herein on April 9, against him in the sum of $604.00 be vacated, set aside and held for naught, for the reasons hereinafter stated.

Your petitioner shows that the plaintiffs herein had prior to the institution of this action, acted and represented this petitioner as his attorneys, and as the relation of attorney and client existed, the plaintiff collected large sums of money at various times, for which no accounting has ever been given by the plaintiff, or had by this petitioner (defendant); that while the cause, herein, was pending, your petitioner, who was by circumstances compelled to seek employment elsewhere for his livelihood, and being unable to attend court, or employ counsel to do so, agreed with the plaintiff in adjustment of this cause, and not as a waiver of any claims for amount collected by the plaintiff

[illegible] affidavit in which, among other things, he alleged that he [illegible] advised that the case was set for trial on November 6, [illegible]; that his attorney had agreed with the plaintiff's in September [illegible] the case set for trial at "a later date," but that the [illegible] attorney failed to notify him of the date; that his attorney "did [illegible] appear in court at any later date but threw his case."

On December 28, 1928, the court entered an order vacating the judgment. On January 8, 1929, the case was upon the trial [illegible] and was continued until February 16, 1929, for the reason that [illegible] defendant was not ready for trial. On February 16, 1929, the [illegible] was continued to March 8, 1929, and on March 2, 1929, it was [illegible] continued until March 28, 1929. The defendant was present in court [illegible] January 8, 1929, February 16, 1929, and March 2, 1929, and March [illegible], 1929. On March 28, 1929, the defendant did not appear in court [illegible] on motion of the plaintiff's the case was continued until April [illegible], 1929. On April 9, 1929, the defendant having failed to appear, a [illegible] judgment in the sum of $600.00 was entered against the defendant [illegible] a verdict of the jury.

On July 14, 1929, the defendant filed a petition under [illegible] section 22 of the Municipal Court act, being the present proceeding, [illegible] vacate the judgment entered on April 9, 1929.

The petition which was sworn to by the defendant is [illegible] follows:

[illegible] the petitioner, Julius Becker, defendant in the above entitled cause, and prays to this Honorable Court that the judgment entered herein on April 9, against him in the sum of $600.00 be vacated, set aside and held for naught, for the reasons hereinafter stated.

Your petitioner shows that the plaintiffs herein had prior to the institution of this action, acted and transacted this petitioner as his attorneys, and on the relation of attorney and client existed, the plaintiff collected large sums of money at various times, for which no accounting has ever been given by the plaintiff, or [illegible] (defendant); that while the [illegible] year, your petitioner, who was by circumstances compelled to seek employment elsewhere for his livelihood, and being unable to attend court, or another counsel to do so, agreed with the plaintiff in settlement of this cause, and not as a waiver of any claims for money collected by the plaintiff

and his attorneys, he, this petitioner, gave in full settlement, for the amount claimed in this law suit, a certain note dated July 28, 1925, for the sum of $250.00, signed by Earnest Meznaritz, and received from the plaintiff a certain acknowledgment in words as follows:

'Received of Julius Becker the note (250) of Earnest Meznaritz dated July 28, 1924. This note is taken to investigate its value and determine whether or not it will be taken in settlement of case of Cavender et al. vs. Becker, and to be returned on demand if no settlement is made. Charles Gyongyosi not to be held liable. H.P.Fuhman.'

"And relying on the promise of the plaintiff that such note would be in full settlement of the claim sued upon and receiving no word of any nature from the plaintiff to the contrary, this petitioner believed that the said suit had been dismissed, but afterwards learned that in violation of the agreement, and the promise of the plaintiff, they on April 9 procured a judgment, which judgment is unjust, unfair, and was a deception upon the court and this petitioner, the defendant.

"He, therefore, at this, the earliest opportunity, respectfully prays that the judgment entered in said cause, be vacated and set aside."

Over the plaintiffs' objection to the sufficiency of the petition, the court held that the petition was sufficient. The plaintiffs thereupon filed two affidavits traversing certain allegations in the petition. One of the affidavits, which was made by Herbert P. Fuhrmann, an attorney in the office of the plaintiffs, is as follows:

"That prior to January 5, 1926, Julius Becker telephoned said affiant and requested that the above entitled cause be continued and stated that he had recently had a fire and that he did not have time to prepare for trial, that certain records were destroyed or they were in such shape that they were not available for evidence, and that at the request of said Becker this affiant continued said case until February 16, 1926.

"Said affiant further states that when the case was next upon the trial call this affiant appeared in court in answer to said call, that Becker was present and requested a continuance of said case, that the same was continued by the court until March 2, 1926.

"Said affidavit further states that on March 2nd, when the case was next upon the trial call, this affiant appeared in court, that Becker was present, and again requested that the case be continued, that he had no attorney and was not prepared for trial, that said Becker suggested a settlement to this affiant and agreed to submit a certain note to this affiant for his examination and consideration in connection with said settlement, that the case was continued until March 16, 1926.

"Said affidavit further states that when the case was upon the trial call on March 16th, this affiant again appeared in court, that Becker was also present, that Becker was not prepared for trial and requested a continuance, that at said time he again talked with said affiant about settling, that he

had his attorney, Mr. Mike petitioner, gave in full settlement, for the amount claimed in this law suit, a certain note dated July 28, 1925, for the sum of $850.00, signed by Harmest Kammerlik, he received from the plaintiff a certain assignment in words as follows:

"Received of Julius Becker the note ($850) of Harmest Kammerlik dated July 28, 1924. This note is taken to investigate its value and determine whether or not it will be taken in settlement of case of Lavender et al. vs. Becker, and is to be returned on demand if no settlement is made. Charles Dreyfuss not to be held liable. H.P.Bauman."

"And relying on the promise of the plaintiff that such note would be in full settlement of the claim sued upon and receiving no word of any return from the plaintiff to the company, the petitioner believed that the suit had been dismissed, but afterwards learned that in violation of the agreement, and the promise of the plaintiff, they on April 9 procured a judgment, which judgment is void, and was was a deception upon the court and this petitioner, the defendant.

"Is, therefore, at this, the earliest opportunity, respectfully prays that the judgment entered in said cause, be vacated and set aside."

Over the plaintiff's objection to the sufficiency of the petition, the court held that the petition was sufficient.

The plaintiff thereupon filed two affidavits traversing certain allegations in the petition. One of the affidavits, which was made by Herbert P. Bauman, an attorney in the office of the plaintiff, is as follows:

"Just prior to January 5, 1926, Julius Becker telephoned affiant and requested that the above entitled cause be continued and stated that he had recently had a fire and that he did not have time to prepare for trial, that certain records were destroyed or they were in such shape that they were not available for evidence, and that at the request of said Becker this affiant continued said case until February 16, 1926.

"Said affiant further states that when the case was next upon the trial call this affiant appeared in court in answer to said call. Mr Becker was present and requested a continuance of said case, that the case was continued by the court until June 7, 1926.

"This affiant further states that on March 3rd, when the case was next upon the trial call, this affiant appeared in court, but Julius was present, and again requested that the case be continued, that he had no attorney and was not prepared for trial. That said Julius requested a still more affiant for his assistance and consultation in connection with said settlement, that his case was continued until March 16, 1926.

"Said affiant further states that when the case was upon the trial call on March 16, this affiant again appeared, but Becker was also present, that Becker was not prepared for trial and requested a continuance, that at this time he again talked with said affiant about settling, that he

delivered to said affiant a note dated July 25, 1924, and asked this affiant to ascertain whether or not plaintiffs would accept said note in full settlement of their claim, that said Becker stated he would not guarantee the payment of said note and that he did not want the endorser held, that this affiant told said Becker that he would take said note and, if Becker would give to said affiant satisfactory information as to the responsibility and as to whether or not said note could be collected, that he would take the same up with the plaintiffs, that at said time this affiant gave to said Becker a receipt for said note, conditioned as above, that said Becker stated that he would communicate with affiant by telephone on the following day, that this affiant was not called by said Becker at any time, and that said Becker made no effort, in so far as this affiant is advised, to communicate with this affiant either by telephone, mail or any other means whatsoever.

"Said affiant further states that he did not at any time agree with said Becker that said note would be accepted in full settlement of the claim then pending or that he would cause said suit to be dismissed or that the plaintiff would not take any further or other steps in connection with said case.

"Said affiant further states that when the case was next upon the trial call, March 25th, he again appeared in court, that Becker did not appear, that no person appeared for him, that this affiant of his own motion continued said case until April 1st.

"Affiant further states that when the original judgment was vacated in this case in the month of December, 1925, this affiant was present in the court room and that the Judge, who vacated said judgment, stated to said Becker that the plaintiffs were entitled to have the case tried, that he would set it for January 5, and that Becker must be prepared for trial.

"Affiant further states that when he talked with said Becker with reference to the proposed settlement this affiant stated to said Becker that if said case was settled, the plaintiffs would give to Becker a release of all claims to date, and that the plaintiffs would require from Becker and Margaret Schrieber a release of any and all claims that they might have against the plaintiffs, that if this litigation was to be ended against the defendant, all differences must be settled against the plaintiffs."

The second affidavit, which was made by Harvey L. Cavender, one of the plaintiffs, is as follows:

"That the above entitled case was first reached for trial in the Municipal court on September 25, 1925; that same was continued on several occasions until November 6, 1925; then a judgment was entered against the defendant; that said Becker did not appear in court on any occasion when said case was upon the trial call between September 25th and November 6th; that on the 5th day of December, 1925, said Becker made a motion to vacate said judgment and that the court vacated the same during the month of December, 1925, and set the case for trial on January 5, 1926; that said court at said time stated to Becker that he must be prepared for trial and dispose of said case.

"Said affiant further states that he never entered into any bargain with Julius Becker, nor did any person on behalf of the plaintiff agree with said Julius Becker, at any time, to settle said case or dismiss the same; that an execution has been issued

satisfied by said affiant a note dated July 23, 1924, and marked "affiant to ascertain whether or not plaintiff would accept said note in full settlement of their claim, that said Booker stated he would not guarantee the payment of said note and that he did not want the matter held, that this affiant told said Booker that he would take said note and, if Booker would give to said affiant satisfactory information as to the reasonable value of said note or to whether or not said note would be collected, that he would take the same up with the plaintiff, that at said time this affiant gave to said Booker a receipt for said note, specifically as above, that said Booker stated that he would communicate with affiant by telephone on the following day, that this affiant was not called by said Booker at any time, and that said Booker made no effort, in so far as this affiant is advised, to communicate with this affiant either by telephone, mail or any other means whatsoever.

"Said affiant further states that he did not at any time agree with said Booker that said note would be accepted in full settlement of the claim then pending or that he would cause said suit to be dismissed or that the plaintiff would not take any further or other steps in connection with said case.

"Said affiant further states that when the case was next upon the trial call, March 27th, he again appeared in court, that Booker did not appear, that no person appeared for the, that this affiant of his own motion continued said case until April 1st.

"Affiant further states that when the original judgment was vacated in this case in the month of December, 1928, this affiant was present in the court room and that the Judge, who vacated said judgment, stated to said Booker that the plaintiffs were willing to have the case tried, that he would not if for forfeiture, and that Booker must be prepared for trial.

"Affiant further states that when he talked with said Booker with reference to the proposed settlement this affiant stated to said Booker that if said case was settled, the plaintiffs would give to Booker a release of all claims to date, and that the plaintiffs would require from Booker and Burgaret Gantlebter a release of any and all claims that they might have against the plaintiffs, that if this litigation was to be ended against the defendant, all differences must be settled against the plaintiffs."

The second affidavit, which was made by Harvey L. Hargrave, one of the plaintiffs, is as follows:

"That the above entitled case was first tendered for trial in the Municipal court on September 23, 1928; that same was continued on several occasions until November 6, 1928; when a judgment was entered against the defendant; that said Booker did not appear in court on any occasion when said case was upon the trial call between September 23rd and November 6th; that on the 6th day of December, 1928, said Booker made a motion to vacate said judgment and that the court vacated the same during the month of December, 1928, but set the case for trial on January 3, 1929; that said court at said time stated to Booker that he must be prepared for trial and dispose of said case.

"Said affiant further states that he never entered into any bargain with Julius Booker, nor did any person on behalf of the plaintiff enter into such bargain, at any time, to settle said case or dismiss the same; that he otherwise has been issued

upon the judgment entered April 9, 1926, and returned by the bailiff of the Municipal court wholly unsatisfied; that to the best of the knowledge, information and belief of this affiant, said Becker resides outside of the City of Chicago, in the Village of Morton Grove; that he has no telephone; that this affiant has filed in the Superior court of Cook county, Illinois, a creditors' bill against said Julius Becker and others; that on about the 27th day of May, A. D. 1926, this affiant wrote said Becker a letter, addressed to him at Morton Grove, advising him of the filing of said creditors' bill."

After hearing the matter on the petition and affidavits alone, without taking any oral or documentary evidence, the court entered an order, which is the one involved on the present appeal, vacating the judgment of April 9, 1926.

There is no dispute between counsel for the defendant and counsel for the plaintiffs as to the law applicable to the case. The only question is whether on the petition and affidavits the court was justified in vacating the judgment.

In our opinion the court erred in vacating the judgment. The gist of the petition of the defendant is that the plaintiffs agreed to settle their action against the defendant and accepted the note referred to in the petition in full settlement of their claim against the defendant. The conclusion, however, that the plaintiffs accepted the note in full settlement of their claim is negatived by the receipt, which is set out in the petition and which the petition alleges was given for the note. According to the receipt, the note was not definitely accepted, but was merely taken conditionally for investigation. In the affidavit of Fuhrmann on behalf of the plaintiffs it is averred that no agreement was made with the defendant that the note would be accepted in full payment; that when the receipt for the note was given, the defendant stated that he would communicate with Fuhrmann the next day, but that the defendant failed to do so.

On a consideration of the petition and the affidavits we are of the opinion that the plaintiffs did not accept the note

in settlement of their claim and did not otherwise agree to settle their claim.

For the reasons stated the order of the court vacating the judgment of April 9, 1926, is reversed.

REVERSED.

McSurely, P. J., and Matchett, J., concur.

416 - 31548

MORRIS J. WISHNEVSKY, Appellee, vs. C. F. WENDRICK, Jr., W. A. PETERS and PAUL A. DRATZ, Copartners Doing Business as WENDRICK STEEL CO., Appellants.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by C. F. Wendrick, Jr., and W. A. Peters, copartners doing business as Wendrick Steel Company, and Paul A. Dratz, the defendants from a judgment in favor of Morris J. Wishnevsky, the plaintiff, in an action brought by the plaintiff on a promissory note which the plaintiff claims to own as an innocent purchaser.

The case was tried before the court and a jury. At the close of all the evidence the court instructed the jury peremptorily to find the issues for the plaintiff and to assess the plaintiff's damages at the sum of $2921.81.

The note is as follows:

"2750.00 January 23rd, 1925.
30 days after date we promise to pay to the order of National Salvage Co., Harry L. Midler, Trenton, N. J. Twenty-seven Hundred Fifty Dollars at First National Bank of Harvey, Illinois. Value received with interest at the rate of no per cent per annum.

Wendrick Steel Company,
By C. F. Wendrick, Jr.

No.....Due....."

The endorsements on the back of the note are as follows:

"Paul A. Dratz
National Salvage Co.,
Harry L. Midler, Pres."

The evidence shows that the National Salvage Co. was a corporation.

The only question to be determined is whether the indorsement "National Salvage Co. Harry L. Midler, Pres." is

Exhibit 1. Continued.

Appellee.

G. F. PENNINGTON, Jr., W. A. STRING and PAUL A. SMART, Creditors Doing Business as WEARWICK STEEL CO.,

Appellants.

IN THE CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by G. F. Wendrick, Jr., and W. A. Stern, copartners doing business as Wendrick Steel Company, and Paul A. Smart, the defendants from a judgment in favor of Harry L. Elsner, the plaintiff, in an action brought by the plaintiff on a promissory note which the plaintiff claims to own as an innocent purchaser.

The case was tried before the court and a jury. At the close of all the evidence the court instructed the jury peremptorily to find the issues for the plaintiff and to assess the plaintiff's damages at the sum of $[illegible].00.

The note is as follows:

"$[illegible].00 January 22nd, 1925.

60 days after date we promise to pay to the order of National Salvage Co., Harry L. Elsner, Trustee, $. 1. Twenty-seven Hundred Fifty Dollars at First National Bank of Harvey, Illinois. Value received with interest at the rate of six per cent per annum.

Wendrick Steel Company,
By G. F. Wendrick, Jr.

No.....Due....."

The endorsement on the back of the note was as follows:

"Paul A. Smart
National Salvage Co.,
Harry L. Elsner, Trus."

The evidence shows that the National Salvage Co. was a corporation.

The only question to be determined is whether the instrument "National Salvage Co. Harry L. Elsner, Trus." is

the indorsement of the corporation and also the indorsement of Harry L. Midler individually, or whether the indorsement is that of the corporation only.

The defendant contends that the indorsement is that of the corporation only. The plaintiff contends that the indorsement is the indorsement of the corporation and also the indorsement of Harry L. Miller individually; that the added term "Pres." after the name of Harry L. Midler is merely descriptio personae.

The authorities on the question in controversy are conflicting. We have not been referred to any decision of the Supreme Court of the State of Illinois which is directly decisive of the question, but in support of their contentions both counsel for the plaintiff and counsel for the defendant have cited from the Illinois Appellate Courts decisions which are not harmonious, and also have cited from other states authorities that announce conflicting rules. The Illinois cases relied upon by counsel for the plaintiff are as follows: Lumley v. Kinsella Glass Co., 85 Ill. App. 412, 414; Duffner v. Ball, 86 Ill. App. 519, 521; Night Hawks Burlesque Co. v. Louisville N. & St. L. Consolidated R.R. Co., 40 Ill. App. 49, 50; Chadsey v. McCreery, 27 Ill. 253, 254; Hately v. Pike, 162 Ill. 241, 246.

In our opinion the Supreme Court cases of Chadsey v. McCreery, supra, and Hately v. Pike, supra, do not sustain the contention of counsel for the plaintiff. In the case of Chadsey v. McCreery a note was made payable to James G. McCreery, Treasurer of the R. I. & A. R. R. Co., and the court held that it was not a note of the company but of McCreery individually; and that the word Treasurer was descriptio personae. If the note had been made payable to the company and to McCreery and the indorsement had been signed in the name of the company with the name of James G. McCreery, Treas., following the name of the company, the case then would have been analogous to the case at bar. In the case of

the indorsement of the corporation and also the indorsement of Harry L. Miller individually, or whether the indorsement is that of the corporation only.

The defendant contends that the indorsement is that of the corporation only. The plaintiff contends that the indorsement is the indorsement of the corporation and also the indorsement of Harry L. Miller individually; that the added term "Pres." after the name of Harry L. Miller is merely descriptio personae.

The authorities on the question in controversy are conflicting. We have not been referred to any decision of the Supreme Court of the State of Illinois which is directly decisive of the question, but in support of their contentions both counsel for the plaintiff and counsel for the defendant have cited from the Illinois Appellate Courts decisions which are not harmonious, and also have cited from other states authorities that announce conflicting rules. The Illinois cases relied upon by counsel for the plaintiff are as follows: Lumley v. Illinois Cent. R., 24 Ill. App. 117, 124; Mutual v. Ins. Co., 86 Ill. App. 639, 643; Miami Valley Syndicate Co. v. Louisville N. & St. L. Consolidated R.R. Co., 24 Ill. App. 49, 54; Gardner v. Ballard, 27 Ill. App. 224, 228; Dunlap v. Tyler, 168 Ill. 241, 246.

In our opinion the Supreme Court cases of Gardner v. Ballard, Dunlap, and Dunlap v. Tyler, supra, do not sustain the contention of counsel for the plaintiff. In the case of Gardner v. Ballard a note was made payable to James G. McCreery, Treasurer of the R. I. & A. R. Co., and the court held that it was not a note of the company but of McCreery individually; and that the word Treasurer was descriptio personae. If the note had been made payable to the company and to McCreery and the indorsement had been made in the name of the company with the name of James G. McCreery, Treas., following the name of the company, the case then would have been analogous to the case at bar. In the case of

Hately v. Pike a note in which the Exposition Depot and Hotel Company promised to pay to the order of "Adolph Pike President" $10,000, was signed "The Exposition Depot and Hotel Company, Adolph Pike President, Eli Brandt Secretary," and was indorsed as follows: "Pay to the order of Walter C. Hately. Adolph Pike President. For value received, I hereby guarantee the payment of this note and interest at maturity, or any time thereafter." The court held that the note was payable to Adolph Pike individually; that the indorsement was his individual indorsement; and that the word "President" was descriptio personae. It is obvious that the facts in the case at bar are entirely dissimilar. It may be stated that in discussing the question in the case of Hately v. Pike, supra, the court quoted the following language from Daniel on Negotiable Instruments (vol. I, sec. 16, 4th ed.) which tends to support the contention of counsel for the defendant:

> "Where a note is payable to a corporation by its corporate name, and is then endorsed by an authorized agent or official, with the suffix of his ministerial position, it will be regarded that he acts for his principal who is disclosed on the paper as the payee, and who therefore is the only person who can transfer the legal title."

The Appellate Court case of Lumley v. Kinsella Glass Co. supra, supports the contention of counsel for the plaintiff. In the Appellate Court case of Duffner v. Ball, supra, the question in controversy was not decided. The court expressly said (p. 521):

> "Counsel for appellant and counsel for appellees, in their respective briefs and arguments filed in this court, have discussed the question whether the note described in haec verba in the special count, is the promise of the corporation alone or of it and the appellees jointly; but we do not feel called upon to decide that question, because it is not involved in the state of case made."

In the Appellate Court case of Night Hawks Burlesque Co. v. The Louisville, Evansville & St. Louis Consolidated R.R.Co., supra, the question in controversy related to the following due bill:

"Louisville, Ky., Apl. 20, 1890. Due S. J. Gates, agt. L.E.& St. L.

[illegible] Pike, a note in which the Hyperion Depot and Metal Com-
[illegible] promised to pay to the order of "Adolph Pike President"
[illegible],000, was signed "The Hyperion Depot and Metal Company,
[illegible] Pike President, Wm Frank Secretary," and was indorsed
[illegible]: "Pay to the order of Walter O. Hately. Adolph Pike
[illegible]ident. For value received, I hereby guarantee the payment of
[illegible] note and interest at maturity, or any time thereafter." The
[illegible] held that the note was payable to Adolph Pike individually;
[illegible] the indorsement was his individual indorsement; and that the
[illegible] "President" was descriptio personae. It is obvious that the
[illegible] in the case at bar are entirely dissimilar. It may be stated
[illegible] in discussing the question in the case of Hatch v. Pike, supra,
[illegible] court quoted the following language from Daniel on Negotiable
[illegible] (vol. 1, sec. 78, 4th ed.) which tends to support the
[illegible] of counsel for the defendant:

"Where a note is payable to a corporation by its corporate name, and is then endorsed by an authorized agent or official, with the authority of his ministerial position, it will be regarded as the note for his principal who is disclosed on the paper as the payee, and who therefore is the only person who can transfer the legal title."

The appellate court case of Lumley v. Illinois Steel Co., supra, supports the contention of counsel for the plaintiff. In the appellate court case of Chicago v. Pike, supra, the question in controversy was not decided. The court merely said (p. 282):

"Counsel for appellant and counsel for appellees, in their respective briefs and arguments filed in this court, have discussed the question whether the note described in these pleadings is a negotiable note, in the special sense, in the problem of the corporation alone or of the and the appellees jointly; but we do not feel called upon to decide that question, because it is not involved in the state of case made."

In the Appellate Court case of Illinois Steel Co. v. Lumley, supra, Hanna, J., in the opinion, said:

"The question in controversy related to the following due bill:

Louisville, Ky., Apl. 20, 1890. Due S. J. Gates, agt. L.E.&S.R. R.

Con. R. R. the sum of Forty-one dollars and 60-100 for transportation 16 persons Louisville to Evansville, Ind., and $37.61 in cash. Total, $79.20. J. L. Cain, Manager Night Hawks Company." The court said (p. 56): "This due bill, of itself, furnished no evidence entitling the plaintiff to recover from the defendant. The amount mentioned therein was payable to S. J. Gates, not to the railroad company, and the addition 'agt. L. N. & St. L. Con. R. R.' is a mere descriptio personae' not changing the legal effect. This due bill was signed by 'J. L. Cain, Manager Night Hawks Company,' not by defendant, or by one shown to have lawful authority to execute the instrument on its behalf." It is apparent that this case is not in point.

Further in support of their contention counsel for the plaintiff cited the following Iowa cases: Heffner v. Brownell, 70 Iowa, 591; McCandless v. Belle Plaine Canning Co., 73 Ia. 161; Matthews v. Dubuque Mattress Co., 87 Ia. 346. In the case of Heffner v. Brownell a promissory note was signed "Independence Mfg. Co. v. B. I. Brownell, Pres."; and the court said that it was conceded that the company was bound; and held that as there was nothing to indicate that Brownell was president of the corporation, he was individually liable. In the case of Matthews & Co. v. Dubuque Mattress Co. and John Kapp, it was similarly held that Kapp was individually liable on a note signed, "Dubuque Mattress Co. John Kapp Pt." In the case of McCandless v. The Belle Plaine Canning Co., H. Wessell and A. J. Hartman, a promissory note was signed "Belle Plaine Canning Co. H. Wessell Secretary, A. J. Hartman President;" and the court held, following Heffner v. Brownell, that Wessell and Hartman were individually liable. It will be seen that these Iowa decisions support the contention of counsel for the plaintiff. But in the subsequent case of Consumers Twine and Machinery Co. v. Mount Pleasant Therme Tank Co.,

196 Ia. 64, a contrary rule was announced, and the case of Heffner v. Brownell was expressly over-ruled, the court saying (p. 75)

> "We are reluctant to over-rule a principle established by our prior decisions or to express our disapproval of the result reached in any given case. We are, however, so firmly and abidingly convinced that the conclusion arrived at in Heffner v. Brownell, Day v. Ramsdell, and a few other cases is wrong, that we must decline to follow them as precedents."

In the following Illinois Appellate Court decisions it has been held as to notes the signatures to which were in a similar form to the indorsement of the note in the case at bar, that prima facie such notes were corporate obligations only: Thompson v. Hasselman, 131 Ill. App. 257, 259, 262; Derby v. Gustafson, 131 Ill. App. 281, 285; Northeastern Coal Co. v. Tyrrell, 133 Ill. App. 472, 478; Piser v. Serota and Gans, 182 Ill. App. 390. To the same effect are the following cases from other states: Reeve v. National Bank of Glassboro, 54 N. J. Law, 208, 211; Draper v. Massachusetts Steam Heating Co., 87 Mass. (5 Allen) 338, 339; Miller v. Roach, 150 Mass. 140; Latham v. Houston Flour Mills, 68 Texas, 127, 129.

In our opinion the indorsement in the case at bar was prima facie the indorsement of the National Salvage Company only and not the individual indorsement of Harry L. Midler, for the reason that the name "National Salvage Co." and the name "Harry L. Midler," with the abbreviation "Pres." following the name "National Salvage Co." imports prima facie the relation of principal and agent; and inasmuch as every corporate act must be done by a natural person, Midler must be deemed prima facie to have executed the indorsement as agent for the National Salvage Company. Reeve v. National Bank of Glassboro, 54 N. J. Law, 208, 211.

Furthermore, if, as counsel for the plaintiff maintain, the indorsement constitutes an indorsement of both the

[illegible] 64, a contrary rule was announced, and the case of [illegible] v. Maxwell was expressly over-ruled, the court saying [illegible] p. 75)

"We are reluctant to over-rule a principle established by our prior decisions or to express our disapproval of the result reached in any given case. We are, however, so firmly and obstinately convinced that the conclusion arrived at in Kistner v. Maxwell, Ohr v. Somerfil, and a few other cases is wrong, that we must decline to follow them as precedents."

In the following Illinois Appellate Court decisions [illegible] been held as to notes the signatures to which were in a [illegible] from the indorsement of his note in the case at bar, [illegible] prima facie such notes were corporate obligations only: [illegible] v. Vanderbeek, 131 Ill. App. 207, 208, 209; Darby v. [illegible], 131 Ill. App. 582, 586; Northwestern Coal Co. v. [illegible], 132 Ill. App. 472, 476; Pilger v. Morris and Co., 180 Ill. App. 384. To the same effect are the following cases from other states: Ewing v. National Bank of Alexandria, 14 D. C. App. [illegible] 111; Lynch v. Commonwealth Trust Company, 87 Mass. [illegible] 111, 116; Hill v. Smith, 150 Mass. 160; Latham v. [illegible] Paper Mills, 68 Texas, 127, 128.

In our opinion the indorsement in the case at bar was prima facie the indorsement of the National Salvage Company only and not the individual indorsement of Jerry K. Miller, for the reason that the name "National Salvage Co." and the name "Jerry K. Miller," with the abbreviation "Pres." following the name "National Salvage Co." imports prima facie the relation of principal and agent; and inasmuch as every corporate act must be done by natural persons, Miller must be deemed prima facie to have executed the indorsement as agent for the National Salvage Company. [illegible] v. National Bank of Chesapeake, 84 N. J. L. 308, 311.

Furthermore, it, as counsel for the plaintiff maintain, the instrument constitutes an indorsement of both the

National Salvage Co. in its corporate capacity, and Harry L. Midler, in his individual capacity, then counsel are confronted with the dilemma of explaining who signed the name National Salvage Co. Harry L. Midler did not sign it if the signature Harry L. Midler with the abbreviation of "Pres." after it is to be considered as the individual signature of Harry L. Midler only, the abbreviation "Pres." being merely descriptio personae. In other words, the single signature Harry L. Midler cannot serve in two capacities, namely, an individual capacity and a corporate capacity. As the company was a corporation the signature of the company could be made only by a natural person. The name National Salvage Co. alone, without being followed by the name of some natural person purporting to have authority to sign the name of the corporation, would not be prima facie the indorsement of the corporation. It follows logically therefore that if Harry L. Midler indorsed the note in his individual capacity only, then the National Salvage Co. has not indorsed the note; and that if Harry L. Midler indorsed the note as president of the National Salvage Co., then Harry L. Midler has not indorsed the note individually. According to our opinion, which we have already expressed, Midler indorsed the note for the National Salvage Co. as president of the company. But as the note is made payable to the order of both the National Salvage Co. and Harry L. Midler, the note, to be complete for negotiation, must be indorsed by both.

Section 30 of Art. III of the Negotiable Instruments Act provides that if an instrument is "payable to order it is negotiated by the indorsement of the holder, completed by delivery." Sec. 41 of Art. III of the Negotiable Instruments Act provides that "where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse unless the one indorsing has authority to indorse for the others. It is so held

National Salvage Co. in its corporate capacity, and Harry L. Miller, in his individual capacity, these documents are confronted with the difficulties of explaining who signed the name National Salvage Co. Harry L. Miller did not sign it if the signature Harry L. Miller is the substitution of "Pres." which is to be superimposed on the printed signature of Harry L. Miller only, the abbreviation "Pres." being merely descriptio personae. In other words, the single signature Harry L. Miller cannot serve in two capacities, namely, an individual capacity and a corporate capacity. As the document was a conversion the signature of the company could be made only by a natural person. The name National Salvage Co. alone, without being followed by the name of some natural person purporting to have authority to sign the name of the corporation, would not be acting Ipso the indorsement of the corporation. It follows logically therefore that if Harry L. Miller indorsed the note in his individual capacity only, then the National Salvage Co. has not indorsed the note; and that if Harry L. Miller indorsed the note as president of the National Salvage Co., then Harry L. Miller has not indorsed the note individually. According to our statutes, which we have already expressed, Miller indorsed the note for the National Salvage Co. as president of the company. But as the note is made payable to the order of both the National Salvage Co. and Harry L. Miller, the note, to be complete for negotiation, must be indorsed by both.

Section 30 of Art. III of the Negotiable Instruments Act provides that if an instrument is "payable to order it is negotiated by the indorsement of the holder, completed by delivery." Sec. 41 of Art. III of the Negotiable Instruments Act provides that "where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse unless the one indorsing has authority to indorse for the others. It is no bar

in Crahe v. Mercantile Savings Bank, 295 Ill. 374, 375.

It is a well established rule that a promissory note has no validity until the name of the payee appears on it as an indorser. Blatchford v. Milliken, 35 Ill. 434, 440; Yost v. Eckhart, 209 Ill. App., 30, 34; Hoblit v. Sandmeyer, 166 Ill. App. 431, 435; 7 Cyclopedia of Law and Procedure, pp. 791, 792.

In our opinion, since both payees did not indorse the note in the case at bar, the note was not in proper form to be lawfully negotiated, and consequently the plaintiff did not acquire a legal title to the note. It follows also that the plaintiff took the note subject to all legal and equitable defenses. First National Bank of Centralia v. Strang, 72 Ill. 559, 560; Sturges v. Miller, 80 Ill. 241, 242, 243; Pierik v. Mueller, 201 Ill. App. 108, 109; Dazey v. Jeffers, 127 Ill. App. 307, 310.

In this view, the trial court committed reversible error in giving the peremptory instruction to the jury to find for the plaintiff.

For the reasons stated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

[illegible] v. Kennedy Savings Bank, 300 Ill. 574, 579.

It is a well established rule that a promissory note [illegible] as validity until the name of the payee appears on it as an [illegible]orsee. [illegible] v. [illegible], 55 Ill. 494, 440; West v. [illegible], 300 Ill. App., 80, 84; [illegible] v. [illegible], 166 Ill. App. [illegible], 147; 7 Cyclopedia of Law and Procedure, pp. 701, 702.

In our opinion, since both payees did not indorse the [illegible] in the case at bar, the note was not in proper form to be [illegible]ally negotiated, and consequently the plaintiff did not acquire [illegible] title to the note. It follows also that the plaintiff took [illegible] note subject to all legal and equitable defenses. First National [illegible] of [illegible] v. [illegible], 74 Ill. 248, 250; [illegible] v. [illegible], [illegible] Ill. 601, 742, 744; [illegible] v. [illegible], 201 Ill. 404, 407, 408; [illegible] v. [illegible], 187 Ill. App. 307, 310.

In this view, the trial court committed reversible error [illegible] giving the peremptory instruction to the jury to find for the plaintiff.

For the foregoing reasons the judgment is reversed and the [illegible] remanded.

REVERSED AND REMANDED.

[illegible], P. J., and Matchett, J., concur.

147 - 31277

SINCLAIR REFINING CO., a corporation, Appellee, v. LOUIS PAVLAKOS, trading as Nick Pavlakos, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

On May 14, 1925, plaintiff commenced an attachment suit on the ground of non-residence against Louis Pavlakos, "trading as Nick Pavlakos," to recover a balance of $1298.31, claimed to be due for certain gasoline, oils and lubricants sold and delivered during the months of August, September and October, 1924. Under the writ the sheriff attached certain real estate, known as 6707-6709 South Racine avenue, Chicago, owned by Louis Pavlakos, who was a resident of Athens, Greece, and then in that city. Plaintiff's declaration, in addition to the common counts, contained a special count, in which it was alleged that during said months the defendant, Louis Pavlakos, was operating, by and through Nick Pavlakos, his son and duly authorized agent for that purpose, a gasoline station located on said real estate; that Nick Pavlakos, acting as such agent, ordered the merchandise, and had paid for some of it; and that there was a balance due from the defendant of $1298.31. A general appearance of defendant was filed by attorneys and an affidavit of defense, sworn to by Nick Pavlakos. The substance of the affidavit is that defendant did not control and operate the gasoline station but that his son, Nick, did so on his own

account; that defendant did not purchase the merchandise or authorize its purchase; and that defendant was not indebted to plaintiff in any sum. A trial was had without a jury, at which two witnesses testified for plaintiff, and Nick Pavlakos for defendant, and certain writings were introduced, including a certain power of attorney to Nick Pavlakos, executed by defendant on June 2, 1924. The court found the issues for plaintiff, assessed its damages at the full amount of its claim, and, on May 4, 1926, entered judgment against defendant for $1298.31. This appeal followed.

The main issues on the trial were, whether Nick Pavlakos in ordering the merchandise, did so on his own account, or as the duly authorized agent of defendant, Louis Pavlakos, and whether Nick or Louis owed the claimed balance (as to the amount of which there was no dispuate) to plaintiff. It appears from certain bills rendered by plaintiff to Nick, in his name, and from certain letters written by plaintiff to Nick, that credit for the merchandise was given solely to Nick. It appears also from the testimony of plaintiff's two witnesses, Matthias and Allen, its employees and who sold for plaintiff the merchandise on credit, that neither ever saw defendant or ever had any dealings or correspondence with him, and that the account on plaintiff's books for the merchandise was against Nick and not defendant.

It also appears from Nick Pavlakos' testimony that defendant's real estate was improved with a store and gasoline station, with the usual accompanying tanks, pumps, etc.; that in the month of June, 1923, defendant went to Athens, Greece, and has been there ever since; that previous to his departure he leased the premises to one Pagler for use as a gasoline

[illegible] that defendant did not purchase the merchandise or [illegible] its personal; and that defendant was not indebted to [illegible] in any sum. A trial was had without a jury, at which [illegible] witnesses testified for plaintiff, and Nick Tavlikos for [illegible], and certain writings were introduced, including a [illegible] power of attorney to Nick Tavlikos, executed by defendant [illegible] June 5, 1924. The court found the issues for plaintiff, [illegible] damages at the full amount of its claim, and, on [illegible] 4, 1926, entered judgment against defendant for $1923.[illegible]. [illegible] appeal followed.

The main issues on the trial were, whether Nick Tavlikos [illegible] entering the merchandise, did so on his own account, or as [illegible] agent of defendant, Louis Tavlikos, and [illegible] Nick or Louis made the claimed payments (as to the amount [illegible] there was no dispute) to plaintiff. It appears from [illegible] bills rendered by plaintiff to Nick, in his name, and [illegible] letters written by plaintiff to Nick, that credit [illegible] the merchandise was given solely to Nick. It appears also [illegible] the testimony of plaintiff's two witnesses, Hotchkiss and [illegible], the employees and who said for plaintiff the merchandise [illegible] credit, that neither ever saw defendant or ever had any deal- [illegible] or correspondence with him, and that the account on plain- [illegible]'s books for the merchandise was against Nick and not defendant.

It also appears from Nick Tavlikos' testimony that [illegible]'s real estate was improved with a store and dwelling [illegible], with the usual accompanying [illegible], etc.; that [illegible] the month of June, 1923, defendant went to Greece, [illegible] have been since even almost some previous to his departure [illegible] the business to one Tavlikos for one as a partnership

station, who remained as defendant's tenant, selling gasoline, etc., until during the month of March, 1924, when he vacated the premises before the expiration of the lease; that when defendant left Chicago in June, 1923, to take up his residence in Greece he left the management of the real estate and the collection of the rents in the hands of the witness (his son); that defendant was desirous of selling the premises, and that, when Pagler abandoned the premises defendant consented by letter that, pending a sale of the premises, the witness might operate a gasoline business thereon on his own account, and solely for his benefit and not for defendant's benefit; that when the witness made his first purchase of gasoline, etc., he informed Matthias (plaintiff's sales agent) of the above facts, and plaintiff extended credit for the merchandise to the witness individually and not as an agent for defendant; that some time during the summer of 1924, defendant, being desirous of making a loan upon certain of his Chicago real estate, forwarded to the witness a certain power of attorney, dated June 2, 1924, (introduced in evidence by plaintiff); that under this power of attorney the witness made such loan; that subsequently, through the efforts and negotiations of the witness, the premises in question were sold to the Standard Oil Company, but the purchaser refused to receive a deed therefor from the witness (acting as attorney in fact for defendant); and that the deed therefor subsequently was signed by defendant in Greece, was there duly acknowledged by him, and the sale was duly consummated.

During the trial, and before any evidence had been introduced tending to show that Nick Pavlakos was running the gasoline station for defendant and as the latter's agent,

[illegible], who remained on defendant's premises, selling groceries, [illegible], until during the month of March, 1904, when he vacated [illegible] premises before the expiration of the lease; that when [illegible] defendant left Chicago in June, 1903, to take up his residence [illegible] Oregon he left the management of the real estate and the [illegible] collection of the rents in the hands of the witness (this was [illegible]); [illegible] defendant was desirous of selling the premises, and that, [illegible] higher standard the premises had mentioned contracted by letter [illegible], yielding a sale of the premises, the witness might operate [illegible] position thereon on his own account, and solely for [illegible] benefit and not for defendant's benefit; that when the wit- [illegible] made the first purchase of groceries, etc., he informed [illegible] plaintiff's sales agent) of the above facts, and [illegible] plaintiff extended credit for the merchandise to the witness individually and not as an agent for defendant; that some time [illegible] the summer of 1904, defendant, being desirous of making a [illegible] upon certain of his Chicago real estate, forwarded to the [illegible] a certain power of attorney, dated June 8, 1904, [illegible] introduced in evidence by plaintiff); that under this power [illegible] attorney the witness made such loans; that subsequently, [illegible] through the efforts and negotiations of the witness, the premises [illegible] mentioned were sold to the Standard Oil Company, but the pur- [illegible] chaser refused to receive a good charter from the witness (acting [illegible] attorney in fact for defendant); and that the deed thereto [illegible] subsequently was signed by defendant in Oregon, was there duly [illegible] acknowledged by him, and the sale was duly consummated.

During the trial, and before any evidence had been [illegible] tendered tending to show that Miss Prvlicka was running the [illegible] station for defendant and as the landlord's agent,

plaintiff's witness, Matthias, was allowed by the court, over defendant's objection, to testify as to a certain declaration, claimed to have been made by Nick Pavlakos to Matthias about June 8, 1924, when he solicited of plaintiff credit for certain gasoline, etc., viz: "This property all belongs to my father; I am running it for my father; I am handling everything for him." Nick Pavlakos denied making any such statement, so far as it related to the gasoline station business, at that time or at any other time, to Matthias or to any other employee or agent of plaintiff. We think that the court erred in allowing Matthias' said testimony to be admitted in evidence. It is well settled that "an agency cannot be proved by the mere declarations of an agent, when the fact of agency is in issue." (Proctor v. Tows, 115 Ill. 138, 148; Mullanphy Savings Bank v. Schott, 135 Ill. 655, 668; Merchants National Bank v. Nichols & Shepard Co., 223 Ill. 41, 49.) In the last cited case it is said: "The source of authority is the principal, and the power of the agent can only be proved by tracing it to that source in some word or act of the alleged principal." And we fail to find any competent evidence in the present record tending to show that the defendant, Louis Pavlakos, ever authorized his son to engage in said gasoline station business in his (defendant's) behalf or to pledge his (defendant's) credit therefor, or thereafter ratified any such action by his son. On the contrary the evidence clearly shows that Nick Pavlakos purchased the merchandise in question solely on his own account and that credit for the same was given to him individually. Plaintiff's counsel contend that the power of attorney above mentioned, given by defendant, was broad enough in its language to authorize defendant's son to operate for

defendant the gasoline station business on the premises. After reading the instrument we cannot agree with the contention. The powers granted had reference only to the sale or mortgage or leasing of defendant's Chicago real estate. And the clause in the instrument giving said son the power "to purchase any personal property and real estate from time to time as he may choose," when read in connection with the further clause, "to make all alterations and improvements" upon said real estate as he may see fit, clearly refers to the purchase only of such personal property or chattels as might be necessary for the maintenance and upkeep of the real estate. Furthermore, when the first credits were extended by plaintiff to Nick Pavlakos for gasoline, etc., the power of attorney had not been delivered and at the times when plaintiff's agents extended the further credits for the merchandise sued for neither of them had seen said power and plaintiff could not have relied upon it.

In our opinion there is no evidence contained in the present record to support the judgment of the court against Louis Pavlakos as rendered, or which could support any judgment against him in any amount in favor of plaintiff. It is clear that Nick Pavlakos, and not defendant, is plaintiff's debtor for the value of the merchandise sued for. Accordingly the judgment of the circuit court appealed from is reversed without remandment of the cause.

JUDGMENT REVERSED WITHOUT REMANDMENT.

Fitch and Barnes, JJ., concur.

[illegible] the granting clause begins on its premises. After [illegible] the instrument we cannot agree with the contention. [illegible] grants had reference only to the sale or mortgage or [illegible] of defendant's Chicago real estate. And the clause in [illegible] instrument giving said son the power "to purchase any personal property and real estate from time to time as he may choose," [illegible] read in connection with the further clause, "to make all [illegible] improvements" upon said real estate as he may see [illegible], clearly refers to the purchase only of such personal property [illegible] as might be necessary for the maintenance and upkeep [illegible] the real estate. Furthermore, when the first credits were [illegible] by plaintiff to Nick Davlakos for groceries, etc., the [illegible] of attorney had not been delivered and at the time [illegible] plaintiff, clerks entered the credits provided for the [illegible] [illegible] and for payment of item for work and power and plumbing [illegible] it could not have relied upon it.

[illegible] In our opinion there is no evidence contained in the [illegible] record to support the judgment of the court against [illegible] Davlakos as rendered, or which would support any judgment [illegible] him in any amount in favor of plaintiff. It is clear [illegible] Nick Davlakos, and not defendant, is plaintiff's debtor for [illegible] value of the merchandise and for, [illegible] the judgment [illegible] the circuit court appealed from is reversed without remanding [illegible] the cause.

[illegible]

[illegible] and Jones, JJ., concur.

147 - 31277

FINDING OF FACTS.

We find as ultimate facts in this case that defendant, Louis Pavlakos, did not purchase from plaintiff the merchandise in question; that Nick Pavlakos purchased the same solely on his own account and that credit therefor was extended by plaintiff solely to him; that Nick Pavlakos had no authority, express or implied, as agent, to purchase the same for defendant and bind the latter therefor; and that defendant is not indebted to plaintiff in any sum.

156 - 31287

INTERNATIONAL ELECTRIC LAMP COMPANY, a corporation, Appellant,	APPEAL FROM MUNICIPAL
v.	COURT OF CHICAGO.
BOARD OF EDUCATION OF CHICAGO, Appellee.	244 I.A. 652

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On March 10, 1924, plaintiff commenced an action in assumpsit against the Board of Education of Chicago to recover damages for its alleged breach of a written contract, dated February 28, 1922, in that it refused to accept deliveries of the balance of certain incandescent electric light lamps and pay for the same at the contract prices. Plaintiff claimed damages in the sum of about $22,800, being the balance alleged to be due at said contract prices. In addition to its affidavit of defense, defendant filed a claim of set-off, in which it alleged that it had suffered damages by reason of plaintiff's claimed breach of the contract in the sum of about $23,500. After a somewhat protracted jury trial the following verdict was returned: "We, the jury, find the issues on plaintiff's statement of claim and defendant's set-off against the defendant, and assess the plaintiff's damages at the sum of no dollars." On March 16, 1926, the court entered judgment upon the verdict against plaintiff for costs and it appealed. No cross-errors have here been assigned by defendant. Plaintiff's counsel does not complain of any of the court's instructions. His main contention, as we understand it from the various points made in his printed brief, is that the judgment is contrary to the evidence and the law.

In plaintiff's statement of claim it is alleged that, under the written contract (copy attached and made a part of the statement as Exhibit 1) for the purchase by defendant of the 98,000 lamps therein mentioned and aggregating at the contract prices $40,316, there had been delivered to defendant about 41,500 lamps "in accordance with said contract," to the total value at said contract prices of $17,524, which had been paid for by it, as would more fully appear from a written statement, exhibit 2, (attached and made a part of the statement); that the balance of said lamps (about 56,500) "have been tendered by plaintiff to defendant in accordance with said contract," but that defendant has refused to receive them, to plaintiff's damage in the sum of $22,792; and that plaintiff at all times has been, and still is, ready, willing and able to furnish said lamps. In the contract (introduced in evidence) plaintiff agrees, in consideration of the agreements afterwards mentioned to be kept and performed by defendant, "to furnish and deliver" to defendant the designated lamps and at the prices mentioned, for the Chicago Public Schools, and "in strict accordance with the specifications and proposal" of plaintiff, "hereto attached and * * made a part of this contract."

In defendant'saaffidavit of merits it denied that plaintiff had tendered any lamps as alleged, or that those which had been delivered and paid for were of the type and grade called for by the contract, or that it was indebted to plaintiff in any sum.

In defendant's amended statement of set-off it is alleged in substance that under the contract plaintiff was obligated to furnish defendant "electric lamps manufactured

The plaintiff's statement of claim is as alleged that:

under the written contract (copy attached and made a part of the statement as Exhibit 1) for the purchase by defendant of 24,000 lamps therein mentioned and corresponding at the contract prices $40,816, there had been delivered to defendant about [illegible] lamps "in accordance with said contract," to the total [illegible] at said contract prices of $17,[illegible], which has been paid for [illegible] as would more fully appear from a written statement, Exhibit 2, (attached and made a part of the statement); that the number of said lamps (about 24,800) "have been rejected by [illegible] defendant in accordance with said contract," but [illegible] defendant has refused to receive them, to plaintiff's [illegible] in the sum of $[illegible] and that plaintiff at all times [illegible] been, and still is, ready, willing and able to furnish said [illegible]. In the contract (interpreted in evidence) plaintiff agrees, [illegible] consideration of the agreements mentioned to be [illegible] and performed by defendant, "to furnish and deliver" to [illegible] the described lamps and at the prices mentioned, for [illegible] Public Schools, and "in strict accordance with the [illegible] specifications and proposal" of plaintiff, "which attached and made a part of this contract."

In defendant's particulars of merits it denies that [illegible] had tendered any lamps as alleged, or that these were [illegible] been delivered and paid for each of the type and grade [illegible] for by the contract, or that it was indebted to plaintiff [illegible] sum.

In defendant's amended statement of set-off it is [illegible] in substance that under the contract plaintiff was [illegible] to furnish defendant "electric lamps manufactured [illegible] and the Act.

by the Keystone Electric Lamp Division of the General Electric Co.;" that of those contracted for, defendant ordered about 40,000 lamps which were delivered to it, but they were of "an inferior and different type and quality," and were "totally and wholly defective, imperfect, worthless and of no value whatsoever for lighting purposes;" that for these delivered lamps defendant paid to plaintiff the total sum of $17,880, and did so before it had knowledge of their worthlessness for lighting purposes, or that they were not "Keystone" lamps; and that plaintiff has refused to accept the return of said delivered lamps, or to refund the price paid therefor, to defendant's damage to that amount. There are allegations of further damages, making defendant's total claim of set-off, $23,580. Attached as an exhibit is a letter (afterwards introduced in evidence) written by plaintiff by its president, Earl Arcola, to defendant, dated January 24, 1922, (about one month before the execution of the contract sued upon) as follows:

> "In connection with our bid herewith for supplying incandescent lamps to the Board of Education, we have to advise we are applying a discount of 37% from the standard list prices (used by all lamps manufacturers) on type B Vacuum Tungsten lamps and carbon lamps, and 40% from the list prices on type C., or gas filled lamps.
>
> We have during the past year supplied a portion of the lamps used by the Board of Education, having furnished lamps manufactured by the Keystone Electric Lamp Division of the General Electric Co. If awarded this contract we signify our intention of furnishing the same high quality lamp as supplied heretofore."

In a paragraph of the specifications relating to the large Tungsten Filament Lamps, it is said "These specifications determine the acceptability of the Large Mazda lamps to be furnished. * * Mazda is a trade mark applied to those incandescent lamps in the construction of which the manufacturer receives the benefit of the advice and research of the Research Laboratories

at Schenectady."

The evidence disclosed in substance the following: After the execution of the contract defendant ordered and received (including some replacements) about 41,500 lamps, for which it ultimately paid plaintiff over $17,500. Most of the lamps received were so-called "Congress" lamps and not "Mazda" lamps. After most of these deliveries had been made, many complaints were received by John Howatt, chief engineer of defendant, from many engineers at the various school buildings where the lamps had been installed, that many of them were defective in that some exploded when the current was applied, some turned black or smoky, some white or milky, and some burned only a few hours. About twenty-five of these engineers testified to these facts. Howatt testified that upon investigation he found that many of these defective lamps were not "Mazda" lamps and that in other particulars they did not conform to the requirements of the specifications. A. J. Hoffman, an electrical engineer employed by defendant, testified that he specialized in electric lighting; that he was familiar with the provisions of the contract and specifications in question; that in accordance with those provisions the average life of a lamp was 1,000 burning hours; that the "Mazda" lamp is such a lamp, which is manufactured according to certain specifications outlined and adopted by the Research Laboratories at Schenectady, which work in harmony with the Bureau of Standards at Washington, D. C.; that the only company manufacturing lamps, in strict accord with the specifications of the contract in question, was the General Electric Co.; and that the "Congress" lamps, so furnished by plaintiff under said contract, did not comply with said specifications. As the result of the experience which defendant had had, as regards the lamps which

plaintiff had delivered, defendant, although requested, refused to order any more lamps under the contract. And, although plaintiff alleged in his statement of claim that the balance of the number of lamps mentioned in the contract had been tendered to defendant, plaintiff's evidence failed to show that it ever made any tender of any such lamps to defendant. The testimony of plaintiff's president, Earl Arcola, was only to the effect that plaintiff stood ready, able and willing to deliver the balance of the stipulated number of lamps which would be in accord with the specifications of the contract. He also testified that in his opinion most of the delivered lamps, although not "Mazda" lamps, sufficiently complied with the requirements of the specifications. Any weight that this testimony might have had before the jury was greatly lessened, if not entirely overcome, by a letter, introduced by defendant, written by the witness as plaintiff's president on January 3, 1923, in response to defendant's suggestion that plaintiff submit a bid for the furnishing of electric lamps to defendant for that year (viz, the year succeeding the one to which the contract in question applied.) It appeared from the testimony of Hoffman, (who drafted the specifications for the proposed contract for the year 1923) that said specifications were identical in their requirements with those of the specifications of the contract of February 28, 1922, in question. In said letter plaintiff, by Arcola, wrote the then president of defendant:

> "We have received a copy of the specifications for furnishing incandescent electric lamps * *, and your letter accompanying same in which you invite those intending to bid to point out conditions embodied in the specifications that are difficult to meet. * * Those specifications, as written, restrict bidders to the furnishing of 'Mazda' lamps. 'Mazda'

is the trade name for lamps made by the General Electric Co., and no independent companies can bid under these specifications. * * Manufacturers of lamps who are not affiliated with the lamp trust, and whose product is better than or equal to the Mazda lamps are barred from bidding."

After considering the provisions of the contract in question and the accompanying specifications, and after reviewing the evidence, we are of the opinion that plaintiff did not prove such a case as warranted the jury in awarding to it any damages. Under the contract plaintiff was required to deliver lamps in strict accordance with the specifications before payments were due therefor from defendant. Some of the lamps were received and paid for before it was ascertained that many were not of good quality or of the proper kind and did not comply with the specifications. After these facts were ascertained defendant was justified in not giving orders for the balance of the lamps contracted for. It is well settled that before a party to a contract can recover damages for the claimed breach of the other party to accept deliveries of articles contracted to be purchased, such party must show that it has performed or offered to perform its part of the contract, and is not itself in default. (Harber Brothers Co. v. Moffat Cycle Co., 151 Ill. 84, 92; Turner v. Osgood Art Co., 223 Ill. 629, 637; Graham v. Holloway, 44 Ill. 385, 392.) Plaintiff alleged in its statement of claim that it had tendered to defendant the balance of the lamps contracted to be purchased which were in accordance with the contract and specifications, but it introduced no evidence of any such tender or tenders. And, in view of the provisions of the contract, and such allegation, plaintiff cannot rely for a recovery of damages upon the theory that there was what amounted to a waiver of a tender, or that a tender would have

is the truth among the lamps made by the defendant Electric Co., and no independent manufacturer can did manufacture these specifications. * * Manufacturers of lamps who are not affiliated with the Lamp Trust, and whose products is better than or equal to the Mazda lamps are barred from bidding."

After demonstrating the provisions of the contract in question and the accompanying specifications, and after reviewing the evidence, we are of the opinion that plaintiff did not prove such a case as warranted the jury in awarding to it damages. Under the contract plaintiff was required to furnish lamps in strict accordance with the specifications before payment was to be made for them. Some of the lamps received and paid for before it was ascertained that many were not of good quality or of the proper kind and did not comply with the specifications. After these facts were ascertained defendant was justified in not giving notice for the issuance of a lamp contracted for. It is well settled that before a party to a contract can recover damages for the alleged breach by the other party to accept delivery of articles contracted to be performed, such party must show that it has performed or offered to perform its part of the contract, and is not itself in default. (Harper Brothers Co. v. Metropolitan Co., 124 Ill. 84. Turner v. Barnes Co., 225 Ill. 439, 447; Graham v. Lagner, 44 Ill. 328, 329.) Plaintiff alleged in its statement of claim that it had tendered to defendant the balance of the lamps contracted to be purchased which were in accordance with the contract and specifications, but it introduced no evidence of such tender or offer. And, in view of the provisions of the contract, and such allegation, plaintiff cannot rely on recovery of damages upon the theory that there was such tender in a series of a number, or that a tender would have

been unavailing. (Shultz v. Hamilton, 189 Ill. App. 396, 402; Expanded Metal Co. v. Boyce, 233 Ill. 284, 289; Walsh v. North American Storage Co., 260 Ill. 322, 331.) Furthermore, plaintiff did not introduce any evidence as to the amount of damages which it had sustained by reason of defendant's alleged refusal to accept the balance of the lamps. The measure of its damages could not be the contract prices therefor, but the difference between those prices and the fair market prices at the place and time of the breach. (Murray v. Boud & Co., 167 Ill. 368, 374; Bagley v. Findlay, 82 Ill. 524, 525.) There was no evidence that plaintiff had stored the balance of the lamps for defendant and given it notice that this had been done.

And we do not think that the court committed any reversible error in refusing to admit in evidence certain duplicate receipts (offered by plaintiff) for some of the delivered lamps, which receipts were signed by defendant's superintendent of supplies at the times of the respective deliveries, and which, above his signature, had the printed words: "I have personally examined the goods herein recorded and find them equal to specifications, contract and samples in every particular." There was no evidence that said superintendent opened the packages containing the lamps and examined them, or that he had any knowledge as to the qualities of such lamps in general, or any knowledge of the contract or specifications in question, or that he had any authority to bind defendant by any such statement. Furthermore, the lamps so received were fully paid for by defendant.

Nor do we think that the verdict of the jury is so ambiguous and uncertain that a valid judgment could not be entered thereon, as contended by plaintiff's counsel.

It clearly appears that the jury found the issues against defendant on its claim of set-off (of which defendant is not here complaining), and it sufficiently appears that the jury found that plaintiff, on the issues presented by its statement of claim and defendant's affidavit of merits, was not entitled to any damages. Under this verdict and the facts in evidence the judgment against the plaintiff for costs was proper.

Our conclusion is that the judgment of the Municipal court should be affirmed and it is so ordered.

AFFIRMED.

Fitch and Barnes, JJ., concur.

173 - 31305

ANTON KNEISEL et al., Complainants, v. URSUS MOTOR CO., et al., Defendants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
MAXIMILIAN J. ST. GEORGE, Petitioner and Appellant, v. CHICAGO TITLE & TRUST CO., RECEIVER, Respondent and Appellee.	244 I.A. 652

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal appellant seeks to reverse an order of the Circuit court of Cook county, entered March 15, 1926, dismissing for want of equity his petition, filed by leave of court on October 11, 1922, in the pending chancery cause entitled Kneisel, et al. v. Ursus Motor Co., et al., - being a bill for a receiver, an accounting, etc., filed March 2, 1922.

He alleges in substance in the petition that on the day the bill was filed Jacob Goldman was appointed receiver of the assets of the Motor Co. and that he qualified as such; that on the following day certain creditors of the Motor Co. filed a petition in the United States Court for the Northern District of Illinois, praying that the Motor Co. be adjudicated a bankrupt; that one R. D. Buell there was appointed receiver, and he took immediate possession; that on March 30, 1922, the Circuit court authorized Goldman to issue receiver's certificates to raise funds to pay the claims of all creditors who appeared in the bankruptcy proceedings; that on June 10, 1922, the U. S.

court entered an order, conditioned upon it appearing that all scheduled claims against the Motor Co. had been paid, that the bankruptcy proceedings be dismissed; that certain creditors filed their claims, which thereafter were paid; that, although petitioner filed a claim in the bankruptcy court, he shortly thereafter withdrew it at Goldman's request, and as a result the schedule of claims filed did not contain his claim; that on September 20, 1922, it appearing that all scheduled claims of creditors of the Motor Co. had been paid, the U. S. Court dismissed the bankruptcy proceedings and directed its receiver to deliver the assets to Goldman, as receiver in the Circuit court, which was done; that on October 6, 1922, in pursuance of an order of the Circuit court, the real estate of the Motor Co. was sold for $59,000; that, because of certain secured bonds outstanding against the real estate, the net sum realized was not in excess of $45,000; that no order has been entered in the Circuit court granting leave to creditors to file claims; and that petitioner's claim is for attorney's services rendered by him to the Motor Co., amounting in all to $2250, - also for court costs expended in its behalf, amounting to $13.20, - also for damages to a Bethlehem truck, model F, amounting to $4600, which the Motor Co. "took over on or about June 12, 1920, and agreed to store for petitioner's benefit, but instead of storing it, used it continuously until March 3, 1922." Petitioner's total claim, as stated, may for convenience be tabulated as follows:

For professional services rendered to the Motor Co. up to January 3, 1922	$1500.
For professional services rendered thereafter and up to June 30, 1922	750.
For court costs advanced	13.20
For damages to Bethlehem truck, Model F,	4600.
	$6863.20

[illegible] entered an order, established upon it appearing that all [illegible] claims against the Motor Co. had been paid, that the [illegible] proceedings be dismissed; that certain creditors [illegible] their claims, which therefor were paid; that, although [illegible] filed a claim in the bankruptcy court, be shortly [illegible] whether it be Oglebay's request, and as a result the [illegible] of claims filed did not contain his claim; that on [illegible] 20, 1922, it appearing that all preferred claims of [illegible] of the Motor Co. had been paid, the U. S. District Court [illegible] the bankruptcy proceedings and directed its receiver to [illegible] the assets to Oglebay, as receiver in the circuit court, [illegible] that on October 2, 1922, in pursuance of an order [illegible] the circuit court, the real assets of the Motor Co. was sold [illegible] $50,000; that, because of certain mortgaged bonds outstanding [illegible] the real estate, the net sum realized was not in excess [illegible] $12,000; that no order has been entered in the Circuit Court [illegible] leave to creditors to file claims; and that petitioner's [illegible] in for attorney's services rendered by him to the Motor Co., [illegible] in all to $2250, - also for court costs expended in the [illegible] amounting to $13.30, - also for damages to a Robinson [illegible], model F, amounting to $1800, which the Motor Co. "took [illegible] on or about June 12, 1920, and agreed to store for [illegible] plaintiff's benefit, but instead of storing it, used it con- [illegible] until March 3, 1922." Petitioner's total claim, as [illegible], may for convenience be tabulated as follows:

For professional services rendered in the Motor Co. up to January 2, 1922	[illegible]
For professional services rendered thereafter and up to June 12, 1922	[illegible]
For court costs incurred	13.30
For damages to Robinson truck, Model F,	[illegible]

[illegible]

He further alleges that when the truck was received by the Motor Co. it was new and in good condition and worth about $4600; that it had cost petitioner $5,108.95; that its present worth is not in excess of $300. The prayer is that the receiver be ruled to answer, and that petitioner be granted such further relief as "equity" may require.

On January 26, 1923, Goldman, as receiver, answered admitting the happening of said court proceedings and alleging that he had no personal knowledge that petitioner's claim was "well founded;" that he had been informed by the president of the Motor Co., L. S. Szumkowski, that it had agreed to pay petitioner in full settlement for legal services rendered up to February 20, 1922, the sum of $500; that, as to the truck, the same was delivered to the Motor Co. at petitioner's request and for his accommodation, he giving it instructions to sell the same for $1500, and later for $800, but that the company did not sell it; that it was "greatly damaged" while at the premises of the Motor Co., and is not now worth over $300; and that the receiver is ready to pay such amount on petitioner's claim as may be shown to be just.

On the same day the Circuit court (Judge Rush) ordered that the matter be referred to a master "for hearing and report, together with his findings." Much testimony, including that of petitioner and Szumkowski and several witnesses called by petitioner as to his claim for damages to the truck, was taken before the master, and the hearing was concluded during April, 1923. The transcript of the testimony was, however, not returned into court until nearly two years later.

The pending chancery cause of Kneisel et al. v. Ursus

Motor Co., et al., had been assigned originally to the calendar of Judge Rush. On April 20, 1923, the executive committee of the judges re-assigned it to Judge Scanlan, another judge of the court, who conducted a lengthy investigation as to Goldman's acts and doings as receiver. Subsequently the committee ordered that a separate chancery calendar be prepared of all causes (nearly 300 in number) in which Goldman had acted as receiver and that they be assigned to Judge Scanlan, who made further investigations and summoned and heard many witnesses. As a result, on May 14, 1923, the court (Judge Scanlan) entered an order removing Goldman as receiver, and appointing in his stead the Chicago Title & Trust Co., which is still acting as such. (See Kneisel v. Ursus Motor Co., 238 Ill. App. 50, 52; Id. v. Id., 323 Ill. 452, 453.)

On January 15, 1925, on petitioner's motion, the court (Judge Scanlan) entered an order that the master, to whom the petition had originally been referred, "file with the clerk of this court within 10 days his report of the testimony taken, * * but not a report of his conclusions of law and of fact, provided, however, that petitioner pay to the master his charges and expenses which have accrued in connection with said reference." At this time Judge Scanlan evidently had determined that subsequently there would be a new hearing in open court upon the petition, without regard to the prior reference. Petitioner paid the master's fees, etc., amounting to over $300, and the master made a short report, dated and signed on January 22, 1925, and returned the same to the court, together with the testimony, which is contained in the present record. Although it does not appear actually to have been filed in the cause, it, however, was ordered impounded with the clerk, and frequently was referred to by

[illegible] had been assigned originally to the ordinary
Judge Dunn. On April 20, 1920, the executive committee of
the judges re-assigned it to Judge Cummins, another judge of the
court, who conducted a lengthy investigation as to Goldman's acts
in delays as receiver. Subsequently the committee received the
corporate summary estimates be prepared of all counsel (nearly 200
number) in which Goldman had acted as receiver and that they
assigned to Judge Cummins, who made further investigations and
heard and heard many witnesses. As a result, on May 14, 1923,
court (Judge Cummins) entered an order removing Goldman as
receiver, and appointing in his stead the Chicago Title & Trust
which is still acting as such. (See Sheldon v. Crown Point
[illegible] 152 Ill. App. 80, 82; Ide v. Ed., 308 Ill. 488, 492.)

On January 18, 1928, on petitioner's motion, the court
Judge Cummins) entered an order that the receiver, to wham the
had originally been referred, "file with the clerk of
court within 10 days his report of the testimony taken, a
and a report of his examination of law and of fact. Petitioner,
[illegible], that petitioner pay to the master his charges and expenses
have accrued in connection with said references." As this
Judge Cummins evidently had determined that subsequently
would be a new hearing in open court upon the petitions,
not referred to the prior references. Petitioner paid the
master's fees, etc., amounting to over $500, and the master made
report, dated and signed on January 20, 1928, and returned
same to the court, together with the testimony, which is
found in the present record. Although it does not appear
it have been filed in the court, it, however, was returned
filed with the clerk, and frequently was referred to by

opposing counsel and the presiding judge, and treated as being a true and correct transcript, on the subsequent hearing, which, however, was not had until March 5, 1926.

On the hearing petitioner testified in his own behalf as to that portion of his claim for attorney's services, in which he was corroborated in certain particulars by the testimony of his witness, L. J. Leon. He also testified as to that portion of the claim for damages to the truck. He was cross-examined at great length by counsel for the present receiver and the presiding judge. It appeared from the cross-examination that on March 31, 1922, petitioner filed with the referee in bankruptcy in the U. S. Court the following claim against the Motor Co.:

To bill rendered for professional services to January 3, 1922	$1500.
To court costs advanced	13.20
To damages to Bethelhem truck, Model F	2500.
Total - - - ----	$4013.20

It will be noticed that the item for services amounting to $750, as contained in the petition, does not appear in petitioner's claim as filed with the referee in bankruptcy, and that in the petition his claim for damages to the truck is $2100 in excess of his claim as filed with the referee. Petitioner further testified on cross-examination in substance that within one week after he filed his claim with the referee, he withdrew it; that he made this withdrawal at the request of one of the attorneys for the receiver, Goldman, and upon his verbal promise that he would see to it that petitioner's claim would be paid, after investigation and order of the Circuit court, out of assets in the receiver's hands; that the item of $750 for attorney's fees (contained in the petition but not in the claim as filed with the referee) is for

[illegible] counsel for the prevailing judge, and [illegible] [illegible] [illegible] "[illegible]" on the [illegible] [illegible], which, however, was not had until March 5, 1928.

On the hearing petitioner testified in his own behalf. [illegible] to that portion of his claim for attorney's services, he [illegible] he was accompanied in certain particulars by the testimony [illegible] his witness, L. E. Lane. He also testified as to that portion [illegible] his claim for damages to the truck. He was cross-examined [illegible] Judge by counsel for the present creditor and the [illegible] Judge. It appeared from the cross-examination that on [illegible] 21, 1923, petitioner filed with the referee in bankruptcy [illegible] the U. S. Court the following claim against the bankrupt [illegible]:

"To bill rendered for professional services to [illegible]
June-17 3, 1922
To court costs advanced [illegible]
To damage to Detaldum truck, Model T [illegible]
[illegible]

Total [illegible] $[illegible]

It will be noticed that the item for damages accruing prior, as contained in the petition, does not appear in petitioner's claim as filed with the referee in bankruptcy, and [illegible] in the petition his claim for damages to the truck in [illegible] [illegible] of his claim as filed with the referee. [illegible] [illegible] testified on cross-examination as substance that [illegible] one week after he filed his claim with the referee, he [illegible] the case be made this statement on the payment of [illegible] of the attorneys for the successor, Daldum, and upon his [illegible] promise that he would see to it that petitioner's [illegible] would be paid, after investigation and review of the [illegible] suit, and of advice in the necessarily lengthy [illegible] of $750 for attorney's fees (mentioned in the petition [illegible] but in the claim as filed with the referee) is for

services which he rendered the Motor Co. in endeavors to keep it out of bankruptcy; and that at the time he inserted the item in the petition he believed that it was one properly chargeable against the Motor Co., but that he has since become convinced to the contrary, and that he is "not now insisting upon it." Being pressed to explain why he had increased his claim for damages to the truck, he further testified in substance that when he first saw the truck on the premises of the Motor Co., after it had been used and damaged by it, one Ryzskowski, an officer of the company, informed him that the company could repair it, sell it and get $1500 for it, and the witness directed that the company repair and sell it but informed Ryzskowski that he would claim damages for the difference between the amount obtained at such sale and the truck's fair value when it was delivered to the company; that the company did not repair or sell it, and the witness finally took it away and ascertained that the damage thereto was greater than he first had supposed and that it practically was worthless; that at the time of filing the petition, claiming $4600 damages, he believed that the amount claimed was fair and proper; and that, neither at the time when he agreed with the attorney for Goldman, receiver, that he would withdraw his claim from the bankruptcy court and file a claim in the Circuit court, nor at any subsequent time, was there any understanding between petitioner and Goldman or Goldman's attorney, that the claim to be filed in the Circuit court should be higher than that filed in the bankruptcy court. As to the value of the truck, when he left it with the company, he testified that he had purchasedit, new, a few months before, for $5,108, - paying $2000 down and giving his note for the balance, which note he afterwards paid, and that it only had been driven about 150 miles and was in good condition. He did not testify what its market value was when left with the

vices which he rendered the Motor Co. in endeavoring to keep it
of bankruptcy; and that at the time he inserted the item in
petition he believed that it was one properly chargeable
that the Motor Co., but that he has since become convinced to
contrary, and that he is "not now insisting upon it." Being
ked to explain why he had increased his claim for damages to
truck, he further testified in substance that when he first
the truck on the premises of the Motor Co., after it had
n used and damaged by it, one Kyzakowski, an officer of the
pany, informed him that the company could repair it, sell it
get $1500 for it, and the witness directed that the company
it and sell it but informed Kyzakowski that he would claim
ages for the difference between the amount obtained and much
e and the truck's fair value when it was delivered to the
pany; that the company did not repair or sell it, and the witness
ally took it away and ascertained that the damage thereto was
ater than he first had supposed and that it practically was
tirely; that at the time of filing the petition, claiming $4500
ages, he believed that the amount claimed was fair and proper;
that, neither at the time when he agreed with the attorney for
, receiver, that he would withdraw his claim from the bank-
ptcy court and file a claim in the Circuit court, nor at any
ar time, was there any understanding between petitioner
Coldman or Goldman's attorney, that the claim be filed in
Circuit court should be higher than that filed in the bank-
ptcy court. As to the value of the truck, when he left it with
company, he testified that he had purchased it, new, a few
ths before, for $3,100, - paying $2000 down and giving his note
the balance, which note he afterwards paid, and that it only
been driven about 150 miles and was in good condition. He
not testify what its market value was when left with the

company. On the hearing before the master he had produced as a witness one Winter, a dealer in motor trucks, from whom he had purchased the truck, and who there had testified as to its market value. He also there had produced as witnesses Mrs. Phillips and John Kolski, who testified as to the condition of the truck when it was left with the company. These witnesses were either out of town or could not be found when the hearing was had before Judge Scanlan.

As to the claim of $1500 for attorney's services, petitioner's evidence disclosed in substance the following: That early in January, 1920, the Motor Co., by its president, made a verbal agreement with petitioner whereby he was to receive an annual retainer of $500 for attorney's services to be rendered, for advice, etc., and was to be paid additional compensation for services in court and for time expended on special matters; that for the retainer for the year 1920, he was paid $300, leaving a balance due for that year of $200; that in the latter part of March, 1921, this agreement as to payment of a retainer was cancelled, leaving then a balance due on such account of $367, which remains unpaid; that petitioner acted as attorney for the company in two litigated cases, known as the Gibbons and Wisconsin Lime Co. cases; that in the former he performed services (detailed by petitioner) which reasonably were worth the charges he made therefor, viz, $200; that in the latter (a mechanic's lien case before a master and afterwards before the court upon exceptions) he made many appearances and rendered legal services (detailed by petitioner) which reasonably were worth $500; and that he commenced a suit on a bond in behalf of the Motor Co. against a bonding company under an agreement that his fees therein should be contingent upon a successful outcome, that he advanced costs to the

company. On the hearing before the master he had produced as a witness one Lighter, a dealer in motor trucks, from whom he had purchased the truck, and who there had testified as to the market value. He also there had produced as witnesses Mr. Phillips and John Malnik, who testified as to the condition of the truck when it was left with the company. These witnesses were either not or been or could not be found when the hearing was had before the judge herein.

As to the claim of $1500 for attorney's services, petitioner's evidence disclosed in substance the following: That early in January, 1900, the Motor Co., by its president, made a verbal agreement with petitioner whereby he was to receive the usual retainer of $500 for attorney's services to be rendered, "as advise, etc., and was to be paid additional compensation for services in suits and for time expended on usual matters that for the retainer for the year 1900." He was paid $500, leaving a balance due for that year of $500; that in the latter part of June, 1901, this agreement as to payment of a retainer was modified, leaving that a balance due on such account of $167, which amount upon that petitioner acted as attorney for the company in two litigated cases, known as the Gibbons and Sherman Line Co. Merely that in the former he performed services (detailed by petitioner) which reasonably were worth the charges he made. Therefor, viz, $1500; that in the latter (a mechanic's lien case before a master and afterwards before the court upon exceptions) he made many appearances and rendered legal services (detailed by petitioner) which reasonably were worth $1500; and that he accepted a suit on a bond in behalf of the Motor Co. against a banking company under an agreement that his fees therein should be contingent upon a successful outcome, that he received cash in the

amount of $13.20, which never were repaid to him, that the suit was afterwards turned over to another attorney for the company, and that he does not claim any fees on account of services rendered in that suit. The aggregate sum of these items is $1,080.20, and, as the new receiver introduced no evidence whatever on the hearing, we are of the opinion, after reviewing petitioner's evidence, that, as to that portion of his claim relating to attorney's fees and costs advanced, the court should have allowed the same as a claim against the estate in the receiver's hands to the extent of $1,080.20.

Near the close of the hearing petitioner asked leave to read the testimony of the three witnesses, who as above mentioned had testified before the master on the prior reference as to the market value of the truck when first received by the Motor Co. and its then condition and its condition after use by the company. Upon objection the court denied such leave, and, upon petitioner persisting in his motion, the following occurred:

> THE COURT. I will not allow testimony of any of those witnesses that were taken before the master to be given on this hearing.
>
> MR. ST. GEORGE. Those two witnesses were sworn and they testified in the same proceeding, and I don't know why your Honor should put me to the expense of having them brought here.
>
> THE COURT. You seem to have some difficulty in understanding me. I have ruled and that ends it. * * Your motion to read the testimony of Mrs. Phillips and that other witness given before Master Doyle is denied. * * The court is not satisfied that there was a bona fide effort made in that proceeding to represent the estate and I will not allow that testimony. I notified you of that three days ago and you asked for time to get these witnesses in and you have had a couple of days now. * * This matter was called for trial three days ago. * * Call your next witness."

Whereupon petitioner called another witness, who briefly testified, and petitioner, again taking the stand and attempting to testify as to certain conversations concerning said truck, had with one Janicki, engineer and assistant general manager of the

[illegible]ount of $13,000, which never were repaid to him, that the suit [illegible]e afterwards turned over to another attorney for the company, [illegible]d that he does not claim any fees on account of services rendered [illegible] that suit. The aggregate sum of these items is $1,000.00, and, [illegible] the new receiver introduced no evidence whatever on the hearing, [illegible]ave of the opinion, after reviewing petitioner's evidence, that, [illegible] to that portion of his claim relating to attorney's fees and [illegible]-invested, the court should have allowed the same as a claim [illegible]inst the estate in the receiver's hands to the extent of $1,000.00.

Now the close of the hearing petitioner rested [illegible] read the testimony of the three witnesses, who as above men- [illegible]ned had testified before the master on the point referred to [illegible] the market value of the track when first received by the Water [illegible], and its then condition and its condition after use by the [illegible]ny. Upon objection the court denied such leave, and, upon [illegible]tioner persisting in his motion, the following occurred:

THE COURT. I will not allow testimony of any of these witnesses that were taken before the master to be given on this hearing.

MR. [illegible]. These two witnesses were there and they testified in the same proceeding, and I don't know why your honor should put on in the expense of having them brought here.

THE COURT. I've been to have some difficulty in understanding me. I have ruled that that was it. * * You seeking to read the testimony of the Mobility and that other witness given before another judge is denied. * * The court is not satisfied that there was a bona fide effort made in that proceeding to represent the estate and I will not allow that testimony. I mentioned you or that three days ago and you asked for time to get those witnesses in and you have had a couple of days now. * * Late motion was called for total three days ago. * * Call your next witness."

Thereupon petitioner called another witness, the [illegible] [illegible]ilfield, and petitioner, again stating the ruling and alleging [illegible] specially as to certain conversations concerning said track, had [illegible] one Jenkins, engineer and assistant general manager of the

Motor Co., was not allowed to testify as to them, and upon the sole ground that any statements made by Janicki were made without authority of the company and not binding upon it or its receiver. Thereupon the following occurred:

> MR. ST. GEORGE. Now, your Honor, with reference to the value of the truck, I suppose counsel would object that I would not be qualified to testify as to its value, so I ask that I be given opportunity to bring up the witness who would know its value and saw it at the time. I am not prepared to do that now because of the fact that I always had the impression, though the court seems to think I should not have it, that I would be allowed to read some of this testimony.
>
> THE COURT. I have ruled in all these Goldman matters that I wouldn't allow testimony given before masters during the Goldman regime. * * * We found many of those were collusive, and I am just following out the rule that I have used right along in all these cases. It isn't in this particular case; it has been in all of them.
>
> MR. ST. GEORGE. I would like to have time to call A. Winter, who testified before and who knows this truck. I have been unable to find him but I think I can, if I get a few more days. I was unable to do it yesterday or the day before because I was engaged in a trial."

Thereupon, upon objection by receiver's counsel, the court denied petitioner's application for a continuance for the purpose of procuring the testimony of said witnesses, Winter and Mrs. Phillips, saying: "I am just finishing these Goldman claims now; this is next to the last one and we must go on. Call your next witness or close the case."

> MR. ST. GEORGE. Is the court aware of the order entered in this case for me to file this record before Master Doyle? (referring to the order of January 15, 1925, above mentioned)
>
> THE COURT. Mr. St. George, you have made that statement here in the preliminary examination a number of times. I told you that we had stopped all the masters from making reports on claims that were being heard by masters at the time that Goldman was receiver. * * * I stopped this one. You came before me and asked for the privilege of writing it up in this case. * * * I told you I had no objection to your having it written up at your expense. There was absolutely no understanding that that evidence would be used on this trial. * * * If you have a witness, put him on; let's finish this matter."

Upon petitioner stating that he had no other witness present, and upon receiver's counsel stating that he did not desire to introduce any evidence in its behalf, the court announced: "The case is closed."

The hearing consumed practically the entire court day of March 5, 1926, but the order appealed from, dismissing the petition for want of equity, was not entered until 10 days later. The certificate of evidence discloses that on March 15, 1926, and before said order was entered, petitioner presented to the court a so-called petition, which is in the nature of an affidavit supporting his motion for a continuance, and asked leave to file the same. The petition is signed and verified as of March 6th. The court denied the motion and immediately entered the order appealed from.

After reviewing the present record, and considering the facts and circumstances disclosed, we are of the opinion that the court, as regards that portion of petitioner's claim for damages to the truck, erred in refusing to grant a reasonable time to petitioner to procure the attendance of the witnesses, A. Winter, Mrs. Phillips and John Molski, or, if any were beyond the reach of a subpoena, to procure their depositions. Petitioner's evidence sufficiently showed that he was entitled to recover a considerable sum for damages to the truck occasioned by the unwarranted acts of the Motor Co. The testimony of the witnesses referred to, taken before the master on the prior reference, afforded some basis for definitely determining the amount of the damage. And we think, in view of Judge Scanlan's order of January 15, 1925, that petitioner was warranted in believing that he would be allowed to read the testimony of said witnesses, so taken before the master, on the new hearing, and that, when the court ruled to the contrary, he

Upon petitioner stating that he had no other witnesses present, and upon Goodyear's counsel stating that he did not desire to introduce any evidence in the behalf, the court announced: "The case is closed."

The hearing commenced punctually the entire regular day of March 8, 1966, but the order appealed from, disbarring the petitioner for want of sanity, was not issued until 12 days later. The availability of witnesses indicates that on March 15, 1966, when the order was entered, petitioner presented in the court a well-ordered position, which is in the nature of a lucid argument for his section for a continuance, and asked leave to file the same. The petition is signed and verified as of March 8th. The court denied the motion and immediately entered the order appealed from.

After reviewing the present record, and considering the facts and circumstances disclosed, we are of the opinion that the court, on regards that portion of petitioner's claim for damages to the trial, erred in refusing to grant a reasonable time to petitioner to produce the attendance of the witnesses, A. Ishar, Mrs. Mahlige and John Melaki, or, if any were beyond the reach of a subpoena, to secure their depositions. Petitioner's evidence sufficiently showed that he was entitled to recover a substantial sum for damages in the trade presumed by the unrefuted rule of the case law. The testimony of the witnesses referred to, taken before the hearing on the prior referrers, afforded some basis for definitely determining the amount of the damage. And we think, in view of Judge Jenkins's order of January 18, 1966, that petitioner was warranted in believing that he would be allowed to read the testimony of said witnesses, as taken before the master, at the hearing, and that, upon the court's rulings in the continuity, he

was entitled to a continuance for a reasonable period, so that the evidence already heard might be supplemented by the testimony, either in open court or by depositions, of said witnesses on the question of the amount of damage done to the truck.

The main contention of counsel for the receiver, relied upon to sustain the action of the court in dismissing the petition for want of equity, is that petitioner is not entitled to recover any sum for the reason that he came into a court of equity with unclean hands. It is argued that he was guilty of "reprehensible conduct in connection with his claim, constituting a fraud upon the court," (a) in that he withdrew his filed claim from the referee in bankruptcy of the U. S. Court, and filed the present petition in which he claimed a largely increased sum, and (b) in that he withdrew his claim from the bankruptcy court under an agreement with the attorney for the receiver (Goldman) that if he did so his claim would be taken care of and paid out of the assets of the estate in the Circuit Court, and he failed to disclose, either to the bankruptcy court, or to the Circuit court in his petition filed, the fact of the making of such agreement. We cannot agree with the contention. We do not think that the present record discloses any reprehensible or fraudulent conduct on the part of petitioner. Counsels' strained and unwarranted inferences, many times repeated in their printed brief and argument, do not constitute proof of such conduct. And we fail to find any evidence, when petitioner at the request of Goldman's attorney withdrew his claim from the bankruptcy court, that any improper or unlawful agreement then was made between them or subsequently attempted to be consummated. As to the increases made in the petition over the claim as filed in the bankruptcy court, we think it sufficiently appears that the same were made in good faith. Furthermore, petitioner's claim is in reality a <u>law</u>

[illegible] entitled to a consideration for a reasonable period, so that the evidence already found might be supplemented by the testimony, either in open court or by depositions, of such witnesses on the behalf of the amount of damage done to the track.

The main consideration of counsel for the receiver, Judge [illegible] was to restrain the action of the court in dismissing the petition for want of equity, in that petitioner is not entitled to recover any sum for the reason that he came into a court of equity with unclean hands. It is argued that he was guilty of "unconscionable conduct in connection with his claim, constituting a fraud upon the court," (a) in that he withdrew his filed claim from the clerk's office in bankruptcy of the U. S. Court, and filed the present petition in which he claimed a largely increased sum, and (b) that he withdrew his claim from the bankruptcy court under an agreement with the attorney for the receiver (Dallmann) that if he did so his claim would be taken care of and paid out of the assets of the estate in the District Court, and he failed to disclose this fact to the bankruptcy court, or to the District court in his petition filed, the fact of the making of such agreement. We cannot agree with the contention. We do not think that the [illegible] record discloses any unconscionable or fraudulent conduct on the part of petitioner. Counsel' minutes the contentions of [illegible], many times repeated in their printed brief and argument, but not substantiate proof of such conduct. And we fail to find any evidence, when petitioner at the request of Dallmann's attorney withdrew his claim from the bankruptcy court, that any improper or unfair agreement then was made between them or consummated or intended to be consummated. It is the inference most in the petitioner over the claim as filed in the bankruptcy court, so that it certainly appears that the time were such, it good faith. Furthermore, petitioner's claim is in reality a [illegible]

claim as distinguished from an equitable one. He sought the recovery of certain attorney's fees claimed to have been earned and certain unliquidated damages occasioned to petitioner's auto truck by the unwarranted acts of the Motor Co. And we do not think that the "unclean hands" doctrine applies. But even if it should be considered as applying, because of the filing of a petition in a pending equity cause, wherein he prayed such relief as "equity" may require, still we do not think that the doctrine should militate against his recovery in this case. In Barnes v. Barnes, 282 Ill. 593, 597, it is said: "He who comes into a court of equity must come with clean hands and one who does iniquity cannot have equity, but that maxim is limited in its application to where the substance of the thing is inequitable, and the iniquity must apply to the particular subject matter. It is not sufficient to bar relief that inequitable conduct should relate to the proof of some item or some fact, and where the origin of the claim is not inequitable a fraudulent act in relation to it will not bar relief." (See, also, Fagan v. Roetberg, 320 Ill. 586, 594.)

For the reasons indicated, the order of the Circuit court appealed from, wherein petitioner's petition was dismissed for want of equity, is reversed, and the cause is remanded with directions that, as to that portion of petitioner's claim for attorney's fees and costs expended, it be allowed as a claim against the estate in the present receiver's hands to the extent of $1,080.20; and that, as to that portion of petitioner's claim for damages to the truck in question, there be a new hearing or trial and further proceedings had not inconsistent with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

Fitch and Barnes, JJ., concur.

[illegible] as distinguished from an *unpleasant* one. To consider the [illegible] of certain attorney's fees claimed to have been earned [illegible] portals multimillion damages occasioned by plaintiff's [illegible] taken by the unscrupulous acts of the Motor Co. and we do not think that the "maximum bounds" doctrine applies. But even if it should be considered as applying, because of the filing of a petition in a pending equity cause, wherein be prayed such relief as "equity" may require, still we do not think that the chancellor should minister equitable recovery in this case.

In *Bruce v. Burge*, 222 Ill. 222, 227, it is said: "In what cases like a court of equity must come with clean hands and one who does inequity cannot have equity, but that maxim is limited in its application to where the misconduct of the suitor is inequitable, and the inequity must apply to the particular subject matter. It is not sufficient to bar relief that inequitable conduct should relate to the usual of same item or same fact, and where the grounds of the claim is not inequitable a transgressor in relation to it will not be relief." (See, also, *Kamm v. Tuckhorn*, 220 Ill. 222, 224.)

For the reasons indicated, the order of the Circuit Court appealed from, wherein petitioner's petition was dismissed for want of equity, is reversed, and the cause is remanded with directions that, as to that portion of petitioner's claim for attorney's fees and costs expended, it be allowed as a claim against the estate in the present receiver's hands to the amount of $1,000.00; and that, as to that portion of petitioner's claim for damages to the truck in question, there be a new hearing or trial and further proceedings had not inconsistent with the views herein expressed.

REVERSED IN PART AND REMANDED WITH DIRECTIONS.

196 - 31328

JAY STOUGH, CORNELIUS J. HARRINGTON, GEORGE F. CAROLAN and CHARLES E. LOY, co-partners under the firm name of STOUGH, HARRINGTON, CAROLAN & LOY, Appellees,	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	
EDWIN H. MANASSE, Appellant.	

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an assumpsit suit, commenced November 25, 1924, to recover the reasonable value of attorney's services, claimed to have been rendered to defendant by one of plaintiffs' firm, Jay Stough, during the year 1924, a jury returned a verdict in plaintiffs' favor for $1250, and on April 9, 1926, judgment was entered upon the verdict against defendant, and he appealed.

The declaration consisted of the common counts, supported by an affidavit of claim in which the amount due was stated to be $2500. On November 8, 1924, plaintiffs rendered an unitemized bill to defendant, as follows: "To professional services, $1250." Upon its receipt defendant refused to pay the bill, upon the ground as then stated that the amount was excessive and unreasonable, and the present suit followed.

The only question for our determination, as we read the present somewhat lengthy transcript of the evidence, is whether the verdict and judgment are excessive, as urged by defendant's counsel.

Prior to the year 1924, and while the plaintiff, Jay Stough, was acting as an assistant attorney for a Chicago firm of attorneys, he and defendant purchased jointly certain real estate for re-sale at a subsequent time, and the

purchase proved ultimately to be a profitable venture to both. In January, 1924, plaintiff, after about four years' experience as an attorney, formed the plaintiff firm, and from time to time thereafter and until October, 1924, defendant consulted him professionally on certain legal matters arising in connection with defendant's business and his personal affairs, and plaintiffs instituted three suits in defendant's behalf. Apparently no bills for services as rendered were sent to defendant. Stough claimed that defendant several times requested that the rendering of bills be deferred. Defendant denied this, and claimed that Stough several times told him that, if the real estate venture, as to which they jointly were giving some considerable time, proved profitable, he (defendant) might "forget about the fees." During October, 1924, Stough, individually, instituted an action against defendant for the partition of said real estate. This action displeased defendant and resulted in the breaking of their former friendly relations, and subsequently plaintiffs' bill for services above mentioned was rendered, which, as Stough testified, was only "on account," although it does not on its face so purport to be.

Stough testified in detail as to the legal services rendered on each matter, stating the number of hours consumed by him, the character of the services, and the results obtained, etc. He claimed the value of the services to be over $2500. And two Chicago attorneys, basing their testimony on that of Stough, as to the character of the services and the time consumed as claimed, testified as experts that about $2500 would be a fair and reasonable charge. From an examination of Stough's testimony, however, we are impressed with the facts that some of the matters referred to are of comparatively minor importance and the charges made therefor are unreasonable, and that in others most of the

[illegible] proved ultimately to be a profitable venture to both.

[illegible] January, 1924, plaintiff, after about four years' experience [illegible] an attorney, formed the plaintiff firm, and from time to time [illegible] September and until October, 1924, defendant commissioned him professionally on certain legal matters relating in connection with defendant's business and his personal affairs, and plaintiffs [illegible] instituted three suits in defendant's behalf. Apparently no bills or vouchers or receipts were sent to defendant. Though claimed that defendant several times requested that the rendering of bills be deferred. Defendant denied this, and claimed that though several times said him that, if the real estate venture, on to which they jointly were giving some considerable time, proved profitable, he (defendant) might "forget about the fees." During [illegible] October, 1924, though, individually, instituted an action against defendant for the partition of said real estate. This action dismissed defendant and resulted in the breaking of their former friendly relations, and subsequently plaintiffs' bill for services above mentioned was rendered, which, as though testified, was only "an account," although it does not on its face so purport to be.

Though testified in detail as to the legal services rendered on each matter, stating the number of hours consumed by him, the character of the services, and the results obtained, [illegible]. He claimed the value of the services to be over $2000. And no [illegible] attorney, having short testimony on that of [illegible] to the character of the services and the time consumed he claimed, testified as experts that about $2000 would be a fair and reasonable charge. From an examination of Stough's testimony, however, we are impressed with the fact that some of the matters referred to are of comparatively minor importance and the charges made therefor are unreasonable, and that in either case of the

time claimed to have been consumed thereon was unnecessary, and that in others, for which large charges are made, the results of the services were of no benefit to defendant.

There is no question but that Stough rendered some services for which defendant should pay reasonable fees. But we think that the amount awarded by the jury was unreasonable and excessive, and that the judgment should be reduced by a remittitur down to $800. What was said in Haish v. Munday, 12 Ill. App. 539, 547, is applicable in this case: "The general rule is well stated in Eggleston v. Boardman, 37 Mich. 18, to the effect that the professional skill and standing of the person employed, his experience, the nature of the controversy, both in regard to the amount involved and the character and nature of the questions raised in the case, as well as the result, should all be taken into consideration, in fixing the value of the services rendered." And, as to the testimony of the expert witnesses referred to, the decisions in McMannomy v. Chicago, etc. R. Co., 167 Ill. 497, 510, and Zentner v. Kozminski, 171 Ill. App. 570, 572, are in point. In the McMannomy case it is said: "While opinions are receivable and entitled to due weight, the courts are also well qualified to form an independent judgment on such questions and it is their duty to do so."

Accordingly, the judgment of the Superior court is reversed and the cause remanded for a new trial, unless within 10 days plaintiffs file with the clerk of this court a remittitur of $450, in which event the judgment will stand affirmed to the amount of $800.

AFFIRMED ON REMITTITUR OF $450;
OTHERWISE REVERSED AND REMANDED.

Fitch and Barnes, JJ., concur.

220 - 31352

GUST. KARAMBELAS and JIM GEORGESON, copartners doing business as K. & K. PRODUCTS CO., Appellees,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
LOUIS MATALAS, Appellant.	24 I.A. 653

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On December 16, 1925, plaintiffs commenced an action in assumpsit against defendant, a resident of Kenosha, Wisconsin, to recover a balance of $1317.66, claimed to be due for certain merchandise sold and delivered. Proceedings by attachment in aid (because of defendant not being a resident of Illinois) followed; the bailiff levied upon an auto-truck and certain goods owned by defendant; and, upon defendant giving a forthcoming bond, released the attached property. Defendant entered a general appearance and subsequently there was a jury trial, resulting in a verdict and judgment against defendant for the full amount of plaintiffs' claim.

In plaintiffs' amended statement of claim various sales and deliveries of merchandise, etc., from July 13, to November 21, 1925, inclusive, and the amounts charged therefor, aggregating $6,783.94, are set forth, as are various credits by cash or check from August 1 to November 21, 1925, aggregating $5466.28, all showing a net balance due of $1317.66. Plaintiffs also claimed that said sum was due because of an account stated as of November 21, 1925. In defendant's amended affidavit of merits he claimed that he had paid for all merchandise delivered to him and denied any account stated.

On May 7, 1926, following the jury's verdict, the court

entered judgment against defendant for $1317.66. Within 30 days thereafter, on June 5, 1926, the court amended the judgment order, nunc pro tunc as of May 7, 1926, to the effect that the attachment be sustained, and that, in addition to the general execution ordered, a "special execution also issue against the property attached herein."

We have reviewed the evidence introduced by plaintiff, as also the testimony of defendant, and we cannot say that the verdict is manifestly against the weight of the evidence, as contended by defendant's counsel. We think that the evidence sufficiently disclosed that there was an account stated between the parties as of November 21, 1925, showing an indebtedness for merchandise sold and delivered to defendant them due and owing in the sum of $1317.66. (First National Bank v. Haight, 55 Ill. 191, 193; Weigle v. Brautigam, 74 Ill. App. 285, 292.) And we think that the evidence sufficiently disclosed the sale and delivery to defendant and at the prices mentioned of the merchandise in question. (Price v. Kohn, 99 Ill. App. 115, 116.) Defendant failed to show any payments to plaintiffs which had not been duly credited to him.

Defendant's counsel also contends that the judgment as finally amended and entered is contrary to law, in that there was no evidence introduced sustaining the attachment issue and that the jury did not pass upon that issue. The fact that defendant was a resident of Kenosha, Wisconsin, was not questioned on the trial. Indeed, defendant, called by plaintiffs under section 38 of the Municipal Court Act, admitted that he was a resident of Kenosha and engaged in the fruit business in that city. There was no issue to be submitted to the jury as to the question of defendant's residence. And the court had power and jurisdiction, at any

time within 30 days from the date the judgment was entered, to amend it as the justice and right of the case might seem to require. (Krieger v. Krieger, 221 Ill. 479, 484; Edwards v. Irons, 73 Ill. 583, 585; Grubb v. Milan, 249 Ill. 456, 461.)

Finding no reversible error in the record the judgment of the Municipal court is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

230 - 31362

ELIZABETH GLOOR, Appellee,	)	APPEAL FROM MUNICIPAL
v.	)	COURT OF CHICAGO.
CHARLES COOPERSMITH, Appellant.	)	241 I.A. 653

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

From an order of the Municipal court denying defendant's motion to open a judgment for $470, entered against him by confession on a written lease on April 8, 1926, this appeal is prosecuted.

By the terms of the lease plaintiff demised to defendant a certain apartment in a building at No. 1058 Loyola avenue, Chicago, from May 1, 1925 to April 30, 1927, at a monthly rental of $135, payable in advance. The judgment is made up of the rent due and unpaid for the months of February, March and April, 1926, and $65 attorney's fees. No complaint is made as to the amount of attorney's fees included in the judgment.

Within 30 days after entry of the judgment defendant appeared and moved the court, supporting the motion by a sworn petition, that the judgment be opened and that he be given leave to defend upon the merits. After admitting the execution of the lease, etc., defendant alleges in the petition that on January 7, 1926, he "vacated" the premises, - the rent for that month having been paid; that on that day he presented to plaintiff a "suitable" tenant who was "ready, able and willing to pay the rent * * for the remainder of the term," but that she "refused to sub-let the premises to said tenant," setting forth as her reason the

"religion and nationality" of the proposed tenant, "whose name is Bass"; and that "on or about March 15, 1926, the premises were re-let by plaintiff."

The sole question for our determination is whether defendant's petition, taken in connection with the covenants of the lease, stated such facts as required the trial court, in the exercise of a sound discretion, to grant the prayer.

In the lease there is a covenant that "Lessee shall not sublet" the premises, or any part thereof, "nor assign this lease without, in each case, the consent in writing of Lessor first had and obtained." And in the thirteenth paragraph there is the further covenant:

> "If Lessee's right to the possession of said premises shall be terminated in any way, said premises, or any part thereof, may, but need not, be re-let by Lessor, for the account and benefit of Lessee, for such rent and upon such terms and to such persons and for such period or periods as may seem fit to the Lessor, but Lessor shall not be required to accept or receive any tenant offered by Lessee, nor to do any act whatsoever, or exercise any diligence whatsoever, in or about the procuring of another occupant or tenant to mitigate the damages of Lessee or otherwise, Lessee hereby waiving the use of any care or diligence by Lessor in the relettting thereof."

Counsel for defendant contends that where a tenant under a written lease abandons the demised premises before the expiration of the term it becomes the duty of the lessor to take charge of the premises, and if possible to re-rent them, and thus reduce the amount of the lessee's liability. In support of his contention he cites several decisions rendered by some of the appellate courts of this State and refers to the following statement as contained in the opinion of our Supreme Court in West Side Auction Co. v. Connecticut etc. Ins. Co., 186 Ill. 156, 161, viz: "Upon the abandonment of the leased premises by the tenant it was the right and the duty of the landlord to take charge of the premises,

rights and responsibility" of the Lessee herein, "shall cease and determine"; and that "on or about March 15, 1966, the premises shall be re-let by plaintiff."

The sole question for our determination is whether Plaintiff's petition, taken in connection with the covenants of the Lease, stated such facts as required the trial court, in the exercise of a sound discretion, to grant the prayer.

In the Lease there is a covenant that "Lessee shall not sublet" the premises, or any part thereof, "nor assign this lease without, in each case, the consent in writing of Lessor first had and obtained." And in the thirteenth paragraph there is the further covenant:

> "If Lessee's rights to the possession of said premises shall be terminated in any way, said premises, or any part thereof, may, but need not, be re-let by Lessor, for the account and benefit of Lessee, for such rent and upon such terms and to such persons and for such period or periods as may seem fit to the Lessor, but Lessee shall not be entitled to receive or receive any credit for rent or damages for any such termination, or entering and taking possession, if or when the premises of another occupant or tenant be utilized the damages or benefit or otherwise, under any circumstances the use of the main or filling station shall be utilized in the rehabilitation."

Counsel for defendant contend, that where a tenant under written lease possesses the demised premises before the expiration of the term, it reserves the duty of the lessor to take charge of the premises, and if possible to re-rent them, and thus reduce the amount of the lessee's liability. In support of his contention he cites several decisions rendered by some of the appellate courts of the States and refers to the Fifteenth statement as contained in the opinion of our Supreme Court in Fort Pitt Packing Co. v. Stockyards etc. Ins. Co., 106 Kan. 164, 167, wherein "Upon the abandonment of the leased premises by the tenant it was the right and the duty of the landlord to take charge of the premises,

preserve them from injury, and, if it could, re-rent them, thus reducing the damages for which the lessee was liable." In that case the lessee sent to the agents of the lessor the keys of the demised building, with a letter to the effect that the lessee could not use the building, to which the agents replied that they would not consent to a cancellation of the lease; after the agents received the keys they put up "to rent" signs on the building; the lessee claimed that this showed a surrender of the property, but the court held to the contrary, and, in affirming the judgment rendered by the trial court against the lessee, for rent which accrued after the delivery of said keys, etc., used the language above quoted. In two prior decisions our Supreme Court decided that "in case of an abandonment without fault of the landlord or as the result of his acts, he may re-enter and again rent the premises and credit the lessee with the proceeds, and his so taking possession does not relieve from the payment of rent." (Humiston, Keeling & Co. v. Wheeler, 175 Ill. 514, 516; Marshall v. Grosse Clothing Co., 1[illegible]4 Ill. 421, 424.) From an opinion of the first division of the appellate court for the first district in the recent case of Hirsch v. Home Appliances, 242 Ill. App. 418, 423, it appears that the decisions of the appellate court of this State are somewhat conflicting upon the question whether, after abandonment of the premises by the lessee before the expiration of the term of the lease, the landlord must, if he can, re-rent the premises, thereby lessening the tenant's liability on his covenant to pay the rent reserved. We apprehend that this seeming conflict may have resulted because of different facts or different provisions in the leases in the cases considered. In the case of Rau v. Baker, 118 Ill. App. 150, 153, decided by the Appellate Court for this (first)

district, it is said: "While in case of abandonment by the tenant the authorities are that the landlord may re-enter and re-rent, if he can, we know of no case in which it has been held that the landlord must, if he can, re-rent or lose his remedy against the lessee on the lease. * * The contract remains in force, notwithstanding the abandonment of the premises by the tenant, and the tenant's covenant to pay rent is unimpaired; and we cannot understand how the tenant, by his own wrongful act, can impose on his landlord the alternative of diligently seeking another tenant or losing his remedy on the covenant." In Harmon v. Callahan, 214 Ill. App. 104, a case decided by the third division of the appellate court for this district, the court said (p. 109): "It would seem to be the law that * * the mere abandonment of the premises by the tenant and re-entry by the landlord does not give rise to an obligation on the landlord to endeavor to re-rent. Of course, after re-entry, the landlord may by writing make himself liable to exercise diligence in re-renting, or he may re-enter and re-let and be chargeable with the rents he actually obtains. But, in the absence of any such voluntary conduct, mere abandonment and re-entry do not oblige the landlord to endeavor, by affirmative action, to decrease the tenant's liability." In the Hirsch case, supra, it appears from the opinion that the tenant had vacated the premises used for certain business purposes before the expiration of the term of the lease; that prior to his doing so he had presented to the landlord a "thoroughly reliable" assignee or sublessee who was willing and able to lease the premises for the balance of the term and there conduct a different kind of a business, but that the landlord had refused to accept the offered tenant, either as

assignee of the lease except at a largely increased rental or as a sub-tenant of the defendant; that the material covenants of the lease were the same substantially as those in the present case above quoted; that, three months' rent having accrued on the lease after defendant had vacated the premises, the landlord caused a judgment by confession to be entered against the defendant in the Superior court of Cook County for said rent and attorneys' fees; that after defendant's vacation he had placed the keys of the premises in the landlord's hands, and the latter had put up "to let" signs but had not succeeded in re-renting the premises; that defendant's motion, supported by affidavit setting up these facts, to open up the judgment, etc., was denied; and that he had appealed. The appellate court <u>held</u> that said tenant's affidavit in support of his motion to open up the judgment "failed to set up a meritorious defense," and affirmed the order of the trial court, saying in part (p. 426): "The lease, by its terms, was not assignable, except by the consent of the plaintiff given in writing; yet according to this affidavit the tenant in possession made demand upon his landlord that he accept a tenant other than himself and a tenant who proposed to conduct in the premises of the plaintiff a business other and different from that which, according to the terms of the lease, might be conducted therein. It would certainly be a novel proposition to hold that a tenant in possession might thus force consent to an assignment from a landlord."

In view of the covenants contained in the lease in the present case, the statements in defendant's sworn petition in support of his motion to open the confessed judgment in question, and in the light of the above mentioned decisions, we are of the

opinion that the Municipal court properly denied defendant's motion. His petition does not disclose that he has a meritorious defense to plaintiff's claim for the rent which is the basis for the judgment as confessed. He alleges that he "vacated" the premises on January 7, 1926 (when there was more than a year of the term yet to run) but he states no reason why he did so. He further alleges that on the day he left he presented to plaintiff a "suitable" tenant, who was ready and able to pay the stipulated rent for the remainder of the term, but he does not give any information concerning this proposed tenant other than his name. He further alleges that plaintiff "refused to sub-let the premises to said tenant." She had a right to so refuse, under an express covenant contained in the lease, viz, that "lessor shall not be required to accept or receive any tenant offered by lessee." Furthermore, the parties covenanted that, if the lessee's right to possession should be terminated in any way, the premises "may, but need not, be re-let by Lessor," and "Lessor shall not be required * * to do any act whatsoever, or exercise any diligence whatsoever, in or about the procuring of another occupant or tenant to mitigate the damages of Lessee or otherwise." Defendant finally alleges in the petition that "on or about March 15, 1926, the premises were re-let by the plaintiff." This allegation is noticeable for what it does not state, viz, when, under the re-letting contract, the new tenant took or was to take possession. For aught that appears the new tenant was not to take possession or begin paying rent until May 1, 1926, and the judgment as confessed only included the unpaid rent for the months of February, March and April, 1926.

For the reasons indicated the order appealed from is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

[illegible] that the Municipal court properly denied defendant's motion. [illegible] position does not disclose that he has a meritorious defense to [illegible]tiff's claim for the rent which is the basis for the judgment [illegible]tered. He alleges that he "vacated" the premises on January 7, [illegible] (when there was more than a year of the term yet to run) but he [illegible]tes no reason why he did so. He further alleges that on the day [illegible] he presented to plaintiff a "suitable" tenant, who was ready [illegible] able to pay the stipulated rent for the remainder of the term, [illegible] he does not give any information concerning this proposed tenant [illegible] from his name. He further alleges that plaintiff "refused to re-let the premises to said tenant." He had a right to do so, [illegible] an express covenant contained in the lease, viz, that "Lessee [illegible] not be required to accept or receive any tenant offered by [illegible]." Furthermore, the parties contracted that, if the lessee's [illegible] to premises should be terminated in any way, the premises [illegible], but must kept, be re-let by lessor," and "lessor shall not be [illegible] to do any act whatever, or exercise any diligence [illegible]ever, in or about the procuring of another occupant or tenant [illegible] mitigate the damages of lessee or otherwise." Defendant finally [illegible] in the petition that "on or about March 15, 1926, the [illegible] were re-let by the plaintiff." This allegation is meaningless [illegible] for what it does not state, viz, when, under the re-letting [illegible], the new tenant took or was to take possession. For aught [illegible] appears the new tenant was not to take possession or begin [illegible] rent until May 1, 1926, and the judgment as conformed only [illegible] the unpaid rent for the months of February, March and [illegible], 1926.

For the reasons indicated the order appealed from is [illegible]rmed.

APPEARING.

[illegible] and Barnes, 17., common.

264 - 31396

GREGORY T. VAN METER, administrator of the estate of Charles M. Anderson, deceased, Appellee,	APPEAL FROM
v.	SUPERIOR COURT,
MIDLAND CASUALTY COMPANY, a corporation, Appellant.	COOK COUNTY.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted to reverse a judgment against defendant for $1,500, rendered after verdict by the Superior court of Cook county on April 30, 1926, and based upon a policy of accident insurance (dated August 12, 1915) and certain receipts for monthly premiums thereafter given.

It appears from a letter, signed by one of the daughters of Charles M. Anderson (the insured) and mailed to the company on October 9, 1923, and received by it, that Anderson "was killed in an automobile accident near Wauconda, Ill." on August 4, 1923. In the letter the number of the policy is stated and information is requested as to the steps necessary to collect on it. It further appears from Anderson's written application that his occupation was that of a motorman in the employ of one of the elevated railroads in Chicago; that in case of his death by accident he desired that his estate should be the beneficiary; and that he agreed "to pay the advance premium of $2.40 on or before the first day of each month without notice." On the first page of the policy, numbered 118,806, it is stated:

> "MIDLAND CASUALTY COMPANY, Chicago, hereinafter called the Company, in consideration of the first payment, and of the monthly premium of $2.40, and of

the statements, warranties and agreements in the application endorsed hereon and made a part hereof, * * DOES HEREBY INSURE Charles M. Anderson, * * by occupation a motorman, subject to the provisions, conditions and limitations herein contained and endorsed hereon, from 12 o'clock noon, standard time, * * of the day this contract is dated, until 12 o'clock noon, standard time, of the first day of September, 1915, and for such further periods, stated in the renewal receipts, as the payment of the said premium will maintain this policy and insurance in force, to-wit: (Schedule of Indemnities) Principal Sum - One thousand dollars," etc.

Then follow provisions to the effect that if, while the policy is in force, the Insured shall accidentally sustain bodily injuries, resulting in the loss of his life within 90 days from date of accident, the Company (paragraph (b) of the policy) will pay the "Principal Sum". In paragraph (m) it is stated that "each consecutive month which the Policy shall be carried, without default in the payment of premium therefor, shall add one per cent to the indemnities payable under paragraph (b), but the total of such additions shall never exceed 60% of the benefits therein provided for any loss." In paragraph (p) it is provided: "Reasonable notice must be given in writing to the Company * * after any injury * * for which a claim may be made, with full particulars thereof and full name and address of the Insured or beneficiary, as the case may be. Affirmative proof of death * * must be furnished to the Company within three months of the time of death * *. The Company shall not be liable in any suit to recover under this Policy, unless the same shall be commenced within one year from the time herein provided for the filing of final proofs hereunder. Claims not brought in accordance with these requirements will be forfeited to the Company." In paragraph (r) it is provided: "The acceptance of any renewal premium shall be optional with the Company, and if a past due premium shall be made to and accepted

the statements, warranties and agreements in the application endorsed hereon and made a part hereof. * * LIFE ANNUITY INCOME Section 4. Maturity. * * by completion a maturity, subject to the provisions, conditions and limitations herein contained and endorsed hereon. From 12 o'clock noon, standard time, * * on the day this contract is dated, until 12 o'clock noon, standard time, of the first day of September, 1918, and for each further period, starting in the second year of the policy, on the anniversary of the policy, the Company will pay to the Insured or the Beneficiary, in the event of the death of the Insured, in accordance with the policy and the income or annuity options, as the case may be, the amount of income or annuity, etc.

Then follow provisions to the effect that if, while the policy is in force, the Insured shall accidentally sustain bodily injuries, resulting in the loss of his life within 90 days from the date of accident, the Company (paragraph (b) of the policy) will pay the "Triple Sum". In paragraph (m) it is stated that two consecutive months which the policy shall be overdue, without effect in the payment of premium thereon, shall and are per-mitted the intervening periods under paragraph (b), but the total of such additions shall never exceed 60% of the benefits therein provided for any loss." In paragraph (p) is provided: "Immediate notice must be given in writing to the Company * * after any injury * * for which a claim may be made, with full particulars thereof and full name and address of the Insured or beneficiary, as the case may be. Affirmative proof of death * * must be furnished to the Company within three months of the time of death * *. The Company shall not be liable in any suit to recover under this policy, unless the same shall be commenced within one year from the time herein provided for the filing of final proofs hereunder. Claims not brought in accordance with these requirements will be rejected by the Company." In paragraph (x) it is provided: "The acceptance of any renewal premium shall be optional with the company, and if a part due premium shall be made to and accepted

by the Company, * * or by any agent of the Company, such acceptance shall reinstate the Policy in full as to disability resulting from accidental bodily injuries thereafter sustained, * * ." Immediately following the signatures, evidencing the execution of the policy, there is a copy of the insured's application, and then, under the heading "Notice," the following:

> "Premiums are due on the first day of each month, in advance, and must be so paid either at the Home Office of the Company, or to such person as may be designated by the Company in writing to receive them. * *
>
> In case of death by accident * *, written notice thereof containing particulars must be given immediately to the Company. Give policy number when writing the Company."

The action was commenced on October 21, 1924, i.e., within one year from the time provided in the policy for the filing of final proofs of the insured's death. To plaintiff's original declaration, consisting of three counts, defendant filed a plea of the general issue, and a special plea, to the effect that affirmative proof of the insured's death was not furnished within three months thereof, as provided in paragraph (p) of the policy. On a trial, commenced in January, 1926, a juror was withdrawn and the cause continued. On February 13, 1926, by leave of court, plaintiff filed an amended declaration consisting of three counts. In the first count, after setting forth the policy in haec verba and stating that the insured was killed accidentally in an automobile accident on August 4, 1923, near the Village of Libertyville, Lake County, Illinois, it is averred that "on, to-wit, November 1, 1923, there was furnished the Company affirmative proof of death, which said date was within three months of the time of death of said decedent, and final proofs thereafter." It is further averred that the insured, during his lifetime, kept, performed and complied with all the terms,

y the company, " " or by any agent of the company, and accep-
ce shall relinquish the right in full or in diminishing reduc-
ng from periodical until injuries thereof, continued, " " "
ediately following the signature, stipulating the execution
f the policy, there is a copy of the insured's application, and
ow, under the heading "Notice," the following:

> "Premiums are due on the first day of each month,
> in advance, and must be so paid either at the home
> office of the Company, or to such person as may be
> designated by the Company in writing to receive them.
> " "
>
> In case of death by accident " ", written notice
> thereof containing particulars must be given immediately
> to the Company. Give policy number when writing the
> Company."

The action was commenced on October 24, 1924, two
within one year from the time provided in the policy for the
filing of final proofs of the insured's death. To plaintiff's
original declaration, consisting of three counts, defendant
filed a plea of the general issue, and a special plea, to the
effect that affirmative proof of the insured's death was not
furnished within thirty months thereof, as provided in paragraph
3 of the policy. On a trial, commenced in January, 1926, a
verdict was directed and the cause continued. On February 15,
1926, by leave of court, plaintiff filed an amended declaration
containing three counts. In the first count, after setting
forth the policy in haec verba and stating that the insured was
killed accidentally in an automobile accident on August 6, 1923,
near the village of Libertyville, Lake County, Illinois, it is
averred that "on, towit, November 1, 1923, there was furnished
the company affirmative proof of death, which proof was within
three months of the time of death of said decedent, and final
proofs thereof." It is further averred that the insured, during
the lifetime, kept, performed and complied with all the terms,

provisions and conditions of the policy; that defendant waived the condition requiring payment of premiums on the first day of each month, because defendant for a long time prior to said death accepted the premiums on the 10th or 25th day of the respective months for which premiums were due, and agreed with the insured that the policy should remain in full force until the 28th day of each month for which the premium was not paid on the first day thereof; and that on November 8, 1923, letters of administration were granted to plaintiff, as administrator of the deceased's estate, by the probate court of Cook county, etc. The averments of the second and third counts, although in somewhat different verbiage, are substantially the same. To this amended declaration the defendant pleaded the general issue and several special pleas. One was substantially the same as filed to the original declaration as above mentioned, and another was to the effect that plaintiff failed to pay advance premiums as provided, and that at the time of the Insured's death the policy was cancelled by its terms.

It will be noticed that in the first count the averment, relative to "affirmative proof of death" is that the same "was furnished" within three month's of the insured's death. And in none of the counts is there an averment that the furnishing of such affirmative proof within such time was waived by the Company, and in none are any facts stated showing an excuse for not furnishing such proof within the required time. On the trial, had in April, 1926, plaintiff made no attempt to show that within said three months affirmative proof of the insured's death by accident was furnished to the Company, but, over defendant's objection, he was allowed to introduce certain evidence which he claimed tended to show an excuse for not furnishing

provisions and conditions of the policy; that otherwise, during the condition requiring payment of premiums on the first day of each month, because defendant for a long time prior to said death accepted the premiums on the 10th or 20th day of the respective month for which premiums were due, and agreed with the insured that the policy should remain in full force until the 20th day of each month for which the premiums had not yet been in the first day thereof; and that on December 2, 1922, letters of administration were granted to plaintiff, as administrator of the decedent's estate, by the probate court of Cook county, etc. The evidence of the second and third counts, although in somewhat different language, are substantially the same. To this amended declaration the defendant pleaded the general issue and several special pleas. He was substantially the same as filed to the original declaration above mentioned, and another was to the effect that plaintiff failed to pay premiums as provided, and that at the time of the insured's death the policy was cancelled by its terms.

It will be noticed that in the first count the evidence to "affirmative proof of death" is that the name "was mentioned" within three month's of the insured's death. And the name of the counts in there an evidence that the furnishing of such affirmative proof within such time was waived by the company, and in none are any facts stated showing an excuse for not furnishing such proof within the required time. On the trial, and in April, 1924, plaintiff made an attempt to show that within only three months affirmative proof of the insured's death by insurance was furnished to the Company, but, over defendant's objection, he was allowed to introduce certain evidence which he claimed tended to show an excuse for not furnishing

such proof within the required time and that defendant by its acts had waived the furnishing of such proof within such time. In view of the averments of the declaration, we think that the court erred in admitting this evidence. It is the well settled rule in this State "that, if the plaintiff intends to rely on facts which show a waiver of performance by the defendant, he must plead such facts; that he cannot plead performance and recover under proof of waiver of performance." (Expanded Metal Fireproofing Co. v. Boyce, 233 Ill. 284, 289; Hart v. Carsley Mfg. Co., 221 id. 444, 446; Feder v. Midland Casualty Co., 316 id. 552, 559.) In the Feder case it is said: "The object of a declaration in an action at law is to state the facts constituting the plaintiff's cause of action upon which he relies to recover, so as to enable the defendant to prepare his defense and meet the facts alleged with appropriate evidence. In order to recover the plaintiff must prove the case alleged in his declaration. * * He cannot make one case by his allegations and recover on a different case made by the proof." Furthermore, by the terms of the policy sued upon, the making of affirmative proof of death was a condition precedent to any liability upon the policy, and, as said in the Feder case (p. 560): "There can be no recovery on a contract against one party whose performance is dependent on some act to be done or forborne by the other party unless the condition precedent has been fully or substantially performed by the plaintiff or he has averred and proved a sufficient excuse for the non-performance."

In addition to the letter sent by a daughter of the deceased to defendant on October 9, 1923, first above mentioned, to which the Company replied on October 11th, a Chicago attorney

[illegible] proof within the required time and the defendants by its [illegible] had waived the furnishing of such proof within such time. [illegible] view of the arguments of the defendants, we think that the [illegible] erred in admitting this evidence. It is the well settled [illegible] in this State "that, if the plaintiff intends to rely on [illegible] which show a waiver of performance by the defendant, he [illegible] plead such facts; that he cannot plead performance and re- [illegible] under proof of waiver of performance." Insurance Co. [illegible] Insurance Co. v. Bayne, 83 Ill. App. 389; Hart v. Hartney [illegible] Co., 203 Ill. 444, 449; Reder v. Mutual Benefit Co., 216 Ill. [illegible], 199.) In the Reder case it is said: "The object of a [illegible] litigation in an action at law is to state the facts constituting [illegible] plaintiff's cause of action upon which he relies to recover, [illegible] to enable the defendant to prepare his defense and meet the [illegible] alleged with appropriate evidence. In order to recover the [illegible] plaintiff must prove the case alleged in his declaration. * * [illegible] cannot take one case by his allegations and recover on a [illegible] different case made by the proof." Furthermore, by the terms [illegible] the policy sued upon, the making of affirmative proof of a certain [illegible] a condition precedent to any liability upon the policy, and [illegible] said in the Fuller case (p. 299): "There can be no recovery [illegible] a contract against one party where performance is dependent [illegible] some act to be done or forborne by the other party unless the [illegible] condition precedent has been fully or substantially performed by [illegible] plaintiff or be then excused and waived, a sufficient excuse [illegible] the non-performance."

In addition to the letter sent by a daughter of the [illegible] to defendant on October 9, 1922, first above mentioned, [illegible] the Company replied on October 11th, a letter already

wrote defendant on November 1, 1923, in part as follows: "In re your O. K. Policy, No. 113,806, the insured, Charles M. Anderson, died in August of this year. I hereby certify to that fact. The deceased left him surviving three daughters. * * If you want any further proof of death sheets filled out, be good enough to so indicate and we shall of course comply with your wishes in the premises. Until then we shall consider this then the filing of the claim." Affirmative proof of the death of the insured was required to be furnished by November 4, 1923. Plaintiff was not appointed administrator until after that date, and formal proofs of Anderson's death by accident were not furnished to the Company until March 26, 1924. Under the provisions of the policy we do not think that said letters can be considered as furnishing the required "affirmative proof of death" of the insured. They were merely belated notices of that fact. Furthermore, plaintiff's theory on the trial was that the furnishing of formal proofs of death within the required period had been waived by the Company.

The premium of $2.40 for the month of August, 1923, was not paid prior to August 4, 1923, the day the insured was killed. All previous monthly premiums had been paid. It was further provided in the policy that "this policy shall terminate immediately upon the death of Insured." Inasmuch as we have reached the conclusion that the judgment appealed from should be reversed and the cause remanded, for the reasons above stated, we refrain from commenting on the evidence introduced by plaintiff to sustain the averment in his declaration that defendant, by its course of conduct during the life of the policy, had waived the condition requiring the payment of the monthly premium on the first day of each month.

For the reasons indicated the judgment of the Superior Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Fitch, J., concurs.

Mr. Justice Barnes (specially concurring): While I concur in what is said respecting the grounds given for reversal, I think the proof was inadequate to show waiver of payment of the monthly premium in advance, it being optional with the company under paragraph (r) whether it would accept a monthly premium after it became due, viz., on the first of each month. The fact that it had elected so to do in the past did not deprive it of the right to elect otherwise in the future. Here no payment whatever was made for the month the deceased came to his death.

299 - 31431

HARRY SHLENSKY, MAX SHLENSKY and MARCUS SHLENSKY, doing business as M. Shlensky & Sons, Appellees,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
JACOB SCHOENBURG, Appellant.	244 I.A. 654

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a first class action in assumpsit, commenced June 6, 1924, plaintiffs, in their second amended statement of claim, claimed that, solely by virtue of an account stated and agreed upon by the parties on June 27, 1922, for $1303.46, there was due to them from defendant the said sum and interest thereon from said date at the legal rate, or the aggregate sum of $1,474.96. In defendant's affidavit of merits he denied that on June 27, 1922, any account was stated between the parties or agreed to by him, or that he owes any moneys to plaintiffs. After a trial without a jury the court, on April 15, 1926, found the issues against defendant, assessed plaintiffs' damages at $1474.96, and entered judgment upon the finding, and defendant appealed.

The main contention here made by defendant's counsel is that the finding is against the manifest weight of the evidence on the issue whether on June 27, 1922, the claimed account sued upon was stated by the parties or assented to by defendant. In 1 Corpus Juris, pp. 684-5, Secs. 262-3, it is said: "In stating an account, as in making any other agreement, the minds of the parties must meet. * * To constitute an account stated, the correctness of the balance must receive the assent, express or implied, of both parties. * * And where there are mutual

[illegible]

[illegible]

[illegible]

or cross demands, the parties must come to an agreement as to the allowance or disallowance of the items composing the account; there must be an adjustment, a balance struck, and an assent to the correctness of the balance." (See, Peterson & Co. v. Wachowski, 86 Ill. App. 661, 663; Atlas Ry. Supply Co. v. Forster, Waterbury & Co., 183 id. 553, 560.)

The evidence discloses that the three plaintiffs were copartners in the produce commission business at Joliet, Illinois; that defendant was in the brokerage business at No. 79 West South Water street, Chicago, trading under the name of Schoenburg Fruit & Produce Co., not incorporated; and that during the year 1921, and the early part of the year 1922, the parties had had certain business dealings. The instrument or account sued upon (introduced in evidence by plaintiffs) is written in typewriting upon defendant's stationery, is unsigned, and is as follows:

"June 27, 1922.

Profit on 14 cars Grapefruit	$912.06		
Loss " " " "	579.97		
Balance -	332.09	Your 1/2 -	$166.05
Less (various items of credit enumerated, totaling)		-	44.33
			121.72
Travelling expenses to Florida $125 - 1/2 $62.50		-	62.50
Due Shlensky on G.Fruit		-	184.22
Less two cars Cucumbers, Nos. 43019-43562, $1071.45 1/2 (as per account sales rendered)		-	535.73
Loss on car Grapefruit, No. 25024,	$589.36 1/2	-	294.68
1/2 Loss on car Newtons (as per your invoice)		-	252.18
1/2 Loss car Winesaps (" " " ")		-	185.40
			1,452.21
Less cucumbers taken out by Shlensky as per our invoice rendered May 3rd		-	148.75
Due M. Shlensky & Sons		-	$1,303.46"

The testimony of two of the plaintiffs was to the effect that there was no record kept in plaintiffs' books of the matters and dealings referred to in the account; that on June 27, 1922, there was a meeting had in defendant's office

[illegible] cross demands, the position must come in an agreement as to the difference or disallowance of the items comprising the account; there must be an adjustment, a balance struck, and an account to the correctness of the balance." (See, Patterson & Co., v. Bonnewitz, 66 Ill. App. 663, 665; Allen Ry. Supply Co. v. Carter, Lightbury & Co., 113 Id. 588, 590.)

The evidence discloses that the three plaintiffs were departners in the produce commission business at Joliet, Illinois; that defendant was in the brokerage business at 78 West Tenth Street, Chicago, trading under the name of Schaumburg Fruit Produce Co., not incorporated; and that during the year 1922, and the early part of the year 1923, the parties had certain business dealings. The instrument or accounts sued upon (introduced in evidence by plaintiffs) is written in typewriting upon defendant's stationery, is undated, and is as follows:

"June 27, 1922.

Credit on 14 cars Grapefruit	$2212.08
" " " " "	2172.07
Balance -	114.04
Your I/C -	$2326.08
Less (various items of credit enumerated, totalling) -	[illegible]
[illegible]	[illegible]
[illegible] expenses to Tiefelm (2122 - I/C 2at.40) -	[illegible]
Due Schaumburg on G.Fruit	[illegible]
[illegible] two cars Cantaloupe, Nos. 43012-43026, 1107.42 I/C -	1089.72
(as per account sales rendered)	
[illegible] on car Grapefruit, No. 88024, (2880.24 I/C -	2004.00
[illegible] I/C less 2% on car Bermuda (as per freon invoice) -	1880.19
[illegible] I/C less car freonage (" " " ") -	[illegible]
[illegible]	
[illegible] commissions taken out by Schaumburg on his own	
invoice (whatever May but) -	142.72
Due H. Schaumburg & Sons -	$3,302.46"

The testimony of two of the plaintiffs was to the effect that there was no record kept in plaintiffs' books of the matters and dealings referred to in the account; that on June 27, 1922, there was a meeting had in defendant's office

at which the two plaintiffs, defendant, and one Gladys Post, bookkeeper and stenographer for defendant, were present, and certain dealings previously had between plaintiffs and defendant were discussed; that at the conclusion of the conversation and after Miss Post had typewritten said account defendant handed the paper to one of the plaintiffs and stated that he assented to its correctness. The testimony of Miss Post, no longer in defendant's employ and called as plaintiffs' witness, was most unsatisfactory. She had no independent recollection of having written the account out on the typewriter but she "supposed" she did, and that, if she did, she must have done so on June 27, 1922. Defendant's testimony was to the effect that no meeting was had in his office on June 27, 1922; that he never saw the account until the present action was commenced; that he never assented to its correctness on June 27, 1922, or at any other time; that he had nothing whatever to do with the drafting of the paper; and that he did not know who had drafted it. He further testified that he left Chicago early in May, 1922, for California and was not again in Chicago until July 10, 1922. In this he was corroborated by the testimony of so many witnesses, who had seen him and talked with him in California during said period, that the evidence clearly shows that he was not in Chicago on June 27, 1922, or on a day near that date, and that he could not personally have assented to the correctness of the account. Plaintiffs do not claim any right to recover save on the basis of an account stated. After reviewing the abstract of the testimony, we do not think that they showed by a sufficient preponderance of the evidence that defendant ever assented to the correctness of the account as charged, or that there

was ever an account stated between the parties in the sum of $1303.46, or in any other sum.

Accordingly, the judgment of the Municipal court is reversed without remandment.

REVERSED.

Fitch and Barnes, JJ., concur.

299 - 31431.

FINDING OF FACT.

We find as an ultimate fact in this case that there was not an account stated or agreed upon between the parties on June 27, 1922, as charged.

236 - 31368

AARON ADLER, Appellee, v. JAMES PATEJDL, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The principal point raised on this appeal is that the statement of claim is insufficient to support the judgment appealed from.

The action is one of the fourth class of the Municipal court of Chicago. The statement of claim alleges that there is due plaintiff the sum of $285, being the purchase price of a certain national cash register, which plaintiff purchased from defendant for which, with other items, he received a bill of sale from defendant, that plaintiff was subsequently notified by the National Cash Register Company that the said register was previously sold to one Charles Barbour, and that it had a lien thereon for $285, which plaintiff has paid to said company.

Defendant, without seeking to question the sufficiency of said statement of claim, but apparently understanding the nature of the action, filed his affidavit denying the several allegations aforesaid and any indebtedness to plaintiff, and the case went to hearing on the issues, resulting in a finding and judgment against him for $220.

Section 40 of the Municipal Court Act provides that in fourth class cases a statement of plaintiff's case, if the

suit be on a contract, express or implied, shall consist of a statement of the account or of the nature of the demand, and that the court may adopt such rules and regulations as it may deem necessary to enable the parties, in advance of the trial, to ascertain the nature of the plaintiff's claim or claims or of the defendant's defense or defenses.

The rules of that court are not before us. We must presume, therefore, that the rules afforded defendant means of ascertaining the nature of the demand if he did not understand it. But there is nothing in the record to indicate that he did not understand it, but joining issues on the allegations it must be inferred that he fully understood its nature and in the trial proceeded to meet and raise all questions of fact or law pertinent to the case.

It is true that the pleading does not set forth all the elements of the cause of action with the formality required in common law procedure, that it does not definitely allege the nature of the lien or the express or implied terms of the contract or bill of sale upon which liability is sought to be predicated. But the decisions are numerous in this and the Supreme Court affirming judgments of the Municipal Court where the statement of claim was so defective as not to stand the test of requiring each element of the cause of action to be expressly stated, especially where the parties went to trial on the assumption of the existence of the several elements of the cause of action on which evidence was introduced and the trial had. (Enberg v. City of Chicago, 271 Ill. 404; Lyons v. Kanter, 285 id. 336; Sher v. Robinson, 298 id. 181.) It is unnecessary to cite cases from this court to the same effect.

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the cause of action on which evidence was introduced and the
trial had. (Bowers v. City of Chicago, 271 Ill. 604; Lumber
Company, 223 Ill. 326; Bower v. Robinson, 198 Ill. 122.) It
is unnecessary to cite cases from this court to the same
effect.

Where the statement of claim sufficiently apprises defendant of plaintiff's demand, even if it is technically defective, it will be regarded as sufficient after judgment, especially if the issues joined are such as necessarily require proof of facts defectively stated. (Flaw v. Board, 274 Ill. 232; Gamble-Robinson Comm. Co. v. U. P. R. R. Co., 262 id. 400; Sher v. Robinson, supra.) We think the statement of claim here was sufficient to apprise defendant that plaintiff claimed a breach of a covenant in the bill of sale of the article in question warranting an absolute right of title and possession of defendant, but that the National Cash Register Company held a valid lien thereon for part of the purchase money to the extent of $285 which he was required to pay. No other cause of action could really be inferred from the statement of claim. We must presume, too, in the absence of a bill of exceptions, that evidence of such a state of facts was necessarily heard.

While the judgment was for $220, we must presume that that amount was in accordance with the evidence.

The judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

247 - 31379

DWIGHT BROS. PAPER COMPANY, a corporation, Appellant, v. MORRIS P. GINZBURG, Appellee.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff is a jobber in news print paper. Defendant is owner and publisher of a daily newspaper known as the Daily Jewish Courier. After a preliminary conversation between defendant and plaintiff's salesman Mulveil, their negotiations for the sale of print paper culminated in an alleged contract, consisting of a letter from plaintiff to defendant stating the terms upon which the paper should be sold, and defendant's noted acceptance thereon. It reads as follows:

"The Jewish Courier,
12th and Halsted Sts.,
Chicago, Ill.

Gentlemen:

This is to acknowledge your order placed with our Mr. Mulveil for
3 cars 32" width Rolls Standard #2 White Print, basis 24x36-32#, wound on 3" inside diameter iron cores, rolls 30" diameter. Shipment to be made
1 car July, 1921.
1 car Aug.,1921.
1 car Sept.,1921.
The maximum price at which this paper is to be billed to you is 5½¢ per pound net cash 30 days from date of invoice, sidewalk delivery. We are to give you the benefit of any reduction in price which the mill makes during the life of this contract.
Your signed acceptance hereto constitutes a contract between us.

Very truly yours,
Dwight Bros. Paper Co.
(Signed) R. B. Little,

RBL:S
Accepted: M. P. Ginzburg.
Date 4-6-21."

[illegible] - 21279

[illegible] CORP. - [illegible] CONTROL.
[illegible]
[illegible]

[illegible]

[illegible]
[illegible]
Appellee.

[illegible] - [illegible] OPINION OF THE COURT.

Plaintiff is a jobber in news print paper. Defendant owner and publisher of a daily newspaper known as the Daily [illegible] Courier. After a preliminary conversation between [illegible] and plaintiff's salesman Halvorsen, their negotiations [illegible] the sale of print paper culminated in an alleged contract, [illegible] of a letter from plaintiff to defendant stating the [illegible] upon which the paper should be held, and defendant's [illegible] subsequent thereon. It reads as follows:

"The Jewish Courier,
[illegible] and Dalsted Sts.,
Chicago, Ill.

Gentlemen:

This is to acknowledge your order placed with our Mr. Halvorsen for
3 cars 30" width Rolls Standard Q White Prime, basis [illegible], wound on 3" inside diameter tubes, rolls 30" diameter. Shipment to be made
1 car July, 1921.
1 car Aug., 1921.
1 car Sept., 1921.
The maximum price at which this paper is to be billed to you is $[illegible] per pound net each 30 days from date of invoice, freewalk delivery. We are to give you the benefit of any reduction in price which the mill makes during the life of this contract.
Your signed acceptance hereon constitutes a contract between us.
Very truly yours,
Twight Bros. Paper Co.
(Signed) R. H. Little.

RHL:S
Accepted: H. P. Kinsburg.
Date 4-3-21."

The suit is predicated upon a breach of this contract and the common counts in indebitatus assumpsit.

No question arises on this record as to the fact that defendant accepted the first two carloads delivered to him and became obligated to pay therefor, and the judgment in favor of plaintiff is for $1500.15, which includes the balance of $1224.60 found by the court to be due on said two carloads, and $275.55 interest from October, 1921, when the suit was begun. Plaintiff appeals because the court found that it was not entitled to recover for the third carload. Appellee assigns cross errors in the allowance of interest.

On a former appeal from a judgment in plaintiff's favor for a greater sum we held that the alleged contract between the plaintiff and defendant was vague and indefinite as to price, and unenforcible unless it could be shown that the phrase "reduction in price which the mill makes" has an established technical meaning in the trade dealing with paper. (238 Ill. App. 21.) The evidence in the record indicates that it did not have such a meaning. Hence, as we are bound by that decision, no action for the alleged contract price can be maintained.

On remandment the trial was before the court without a jury. The findings and judgment appear to be based on defendant's liability for the reasonable market value of the first two carload shipments, which appears to have been the same as the invoiced prices. To that extent the right to recovery is not questioned. The controversy arises over the right to recover for the third carload.

The first carload was delivered in July, and the second was on September 7, 1921. About September 15 plaintiff attempted to deliver at defendant's place of business 34

The suit is predicated upon a breach of this contract
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The question arises on this record as to the fact that
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and by the court to be due on said two earlands, and $475.85
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The first earland was delivered in July, and the
econd was on September 7, 1921. About September 12 plaintiff
equested to deliver at defendant's place of business 24

rolls of paper from the third carload. The evidence is conflicting as to what took place and was said at that time with reference to acceptance of the same. The testimony for plaintiff is to the effect that defendant did not have room for the same and requested plaintiff to store it. The testimony for defendant is to the effect that defendant refused to accept the delivery on the ground that the September carload called for in the contract had already been delivered. In reaching its findings the court evidently accepted defendant's version of the facts, and we cannot say that it was not justified in so doing.

The third car was consigned and shipped to plaintiff, and after defendant's refusal to accept the rolls so attempted to be delivered by plaintiff the entire carload was stored in a warehouse in its own name, and remained in its possession and under its control during the entire time after the arrival of the shipment. On such a state of facts the title thereto cannot be said to have passed out of plaintiff. The proof therefore did not sustain the count of plaintiff's declaration predicated on the theory that the property in the goods passed to the buyer.

The counts predicated upon the refusal to receive the goods are manifestly based on paragraph 3 of sec. 63 of the Uniform Sales Act. (Cahill's Stats. 1925, Ch. 121a, par. 66.) That provision of the statute provides that although the property in the goods has not passed, if they cannot readily be resold for a reasonable price the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer, and thereafter the seller may treat the goods as the buyer's and may maintain an action for the price. The evidence tended to show that they could be sold for a

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reference to acceptance of the goods. The testimony for plaintiff
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to be delivered by plaintiff the entire contract was stored in a
warehouse in its own name, and remained in its possession and
under its control during the entire time after the arrival of
the shipments. On such a state of facts the title thereto cannot
hold to have passed out of plaintiff. The proof therefore
does not sustain the court of plaintiff's declaration predicated
on the theory that the property in the goods passed to the buyer.

The cases predicated upon the refusal to receive the
goods are manifestly based on paragraph 1 of sec. 83 of the
Uniform Sales Act. (Smith's Stats. 1923, Ch. 121a, par. 66.)
That provision of the statute provides that although the property
in the goods has not passed, if they cannot readily be resold for
reasonable price the seller may offer to deliver the goods to
the buyer, and, if the buyer refuses to receive them, may notify
the buyer that the goods are thereafter held by the seller as
bailee for the buyer, and thereafter the seller may treat the
goods as the buyer's and may maintain an action for the price.
The evidence tended to show that they could be held for a

price greater than claimed under the contract, and as before stated, we have already held that the contract is not enforcible as to price. Furthermore, the facts as above stated do not indicate that plaintiff held the goods as bailee for defendant. There was no notification to that effect. On the contrary, they were held in plaintiff's own name. Under such a state of facts the proof did not support a cause of action under the special counts. Plaintiff was, therefore, relegated to his cause of action on the common counts. The evidence does not support a stated account, and, as above stated, it does not show that plaintiff sustained any damages from the refusal to receive the goods, even if there was an obligation to receive them.

In view of these conclusions of fact it is unnecessary to consider the various points of law discussed in appellant's brief, for there could be no recovery for the third carload upon the evidence under any theory of the cause of action.

The question of interest raised by appellee seems to be well taken. There is no basis for allowance of interest under the statute upon the facts of this case unless there was unreasonable and vexatious delay of payment for the first two carloads. The evidence indicates that in September, 1921, defendant questioned the binding effect of the contract with reference to the price for the first two carloads. This was before payment would have been due under the contract for the second carload, and only about a month or so after payment would have been due for the first carload. The suit was begun about a month thereafter, and thus far defendant's contentions have been in the main sustained. It was said in Sammis v. Clark,

13 Ill. 544, 547, that no fixed rule can be laid down by which to determine in every case what shall constitute such unreasonable and vexatious delay of payment as will entitle the creditor to interest; that the question must necessarily be determined, to a great extent, on the circumstances in each particular case, and that there must be something more than mere delay to authorize a recovery of interest under this clause of the statute. We do not think the facts of this case bring the claim within the conditions when interest is allowed. Consequently the judgment will be reversed with findings of fact and judgment will be entered here for the amount found by the court to be due for the first two carloads less interest, namely, $1224.60. Each party will pay his own costs.

REVERSED WITH FINDINGS OF FACT
AND JUDGMENT HERE FOR $1224.60.

Gridley, P. J., and Fitch, J., concur.

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FINDINGS OF FACT.

We find that defendant refused to accept the third carload of paper referred to, that plaintiff retained possession thereof after the refusal, that the title thereto did not pass out of plaintiff, that at the time of defendant's refusal to accept said carload there was a market value for such paper equal to the amount of damages claimed by plaintiff, and that plaintiff sustained no damages.

274 - 31406

JOHN SVIENTY, Appellant, v. ADAM KOSTKA et al., Appellees.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

On an affidavit of defendants a judgment against them entered by confession upon a judgment note signed by them and payable to the order of plaintiff for $2000, with interest, was set aside and they were permitted to appear and make a defense, the affidavit to stand as their affidavit of merits. On submission of the case to a jury, the issues were found against plaintiff.

Only one question is raised on this appeal, namely, whether the verdict was not against the weight of the evidence.

The defense set up in said affidavit was that the note was given solely for the accommodation of the plaintiff and for his use and benefit and was without consideration, and that plaintiff defrauded defendants in obtaining the note.

It appears that plaintiff had been conducting a soft drink parlor that was closed by an injunction order; that he afterwards purchased the business of another soft drink parlor with furnishings, etc., from one Joe Orawicz, at a different location; that after running the same for about five days he was informed by the police that he would have to close up or sell out; that he and Adam Kostka then entered into an

arrangement whereby Kostka took possession of and conducted the so-called soft drink parlor purchased from Orawicz. The transaction was evidenced by a lease of the premises from Orawicz to Kostka and the transfer of the license of Orawicz to Kostka as a retail beverage dealer, and also a bill of sale from Annie Svienty, the wife of complainant, to Adam Kostka of the stock of goods in said premises, consisting of cigarets, cigars, beer, tobacco, glassware, and also of the good will of the business, in consideration of $1859.35, and evidenced also by the judgment note in question. That all of these documents were signed and executed by the respective parties is not questioned. Kostka took possession of the premises so leased to him and the stock of goods so sold to him, and conducted the business for a period of three and one-half months, when the place was closed up on a charge of his violating the Dram Shop Act. The papers bear date in July, 1923, and he took possession of the premises about the 15th of that month.

The burden of proof was upon defendants to sustain their defense. They were the only witnesses for themselves. The court ruled that the wife was incompetent to testify in behalf of her husband. Her evidence remains in the record, but is very meager and does not sufficiently bear upon the issues to have any particular force, even if it were competent.

The main point in dispute is whether said written instruments represent a bona fide or merely colorable transaction. On this question of fact plaintiff and Adam Kostka differ. But the burden was on the latter to sustain his case by a preponderance of evidence, and we do not think he did. He admitted that he paid the rent for the premises while he was in there at the rate of $50 a month, and did not deny that he had

paid interest on the note. He admitted that he operated the business for the three and one-half months, selling the stock of goods and chattels that were transferred to him, and that he replenished the stock with moneys he took in from the business, which amounted to from $5 to $10 a day, and that he never made an accounting of the same to plaintiff, and that plaintiff never asked for one from him. It also appears that when the business was closed he took such chattels as were not removed from the premises to his own home where they appear to have remained. Plaintiff denied Adam Kostka's testimony that the transaction was one for his accommodation and not a genuine sale, and seems to be supported by evidence to the effect that Kostka at the time of making the purchase sought to raise money for that purpose, and not being able to do so, gave his note. There was no evidence whatever of fraud, as pleaded by defendants, and it is difficult to reconcile the execution of all the papers aforesaid and the giving of said note if they were intended as a mere matter of form to conceal plaintiff's ownership of the property, or to understand the necessity of defendant Adam Kostka signing the note and procuring his wife's signature thereto, and of plaintiff allowing the matter to run on for months without seeking any accounting for the profits of the business, if it was a mere pretended transaction.

We think the verdict was against the weight of the evidence. The judgment will therefore be reversed and the cause having been tried by a jury it will be remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

302 - 31434

GOLDENROD ICE CREAM COMPANY, a corporation, Appellant, v. FRANK LIGNAWOWSKI, Appellee.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order staying an execution until the further order of court that was issued upon a judgment by confession entered against defendant on his certain promissory notes.

It is urged that the order is not a final, and, therefore, not an appealable one. In that contention we concur. The words "until the further order of court" manifestly contemplate further action of the court, and that the order is temporary in its nature and not permanent and final in character. It was so held in a somewhat similar order in O'Hara v. Pennsylvania R. R., 2 Grant (Pa.) 241, where the execution was stayed until other pending proceedings were finally determined "subject to such further order of the court as the justice of the case may then require." The questions presented for consideration, therefore, as to the extent of the power of the court to stay the execution, and whether it was abused, are not properly before us. Being without jurisdiction to entertain the appeal, it must be dismissed.

APPEAL DISMISSED.

Gridley, P. J., and Fitch, J., concur.

325 - 31457

PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

v.

MILWAUKEE DAIRY COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The appeal in this action presents the same questions as have already been decided in another case having the same title, No. 31456, consolidated herewith, in which we have this day filed an opinion reversing and remanding the judgment. The same order will be entered in this case for the same reason.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

326 - 31458

PEOPLE OF THE STATE OF ILLINOIS, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
MILWAUKEE DAIRY COMPANY, a corporation, Appellant.	

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The appeal in this action presents the same questions as have already been decided in another case having the same title, No. 31456, consolidated herewith, in which we have this day filed an opinion reversing and remanding the judgment. The same order will be entered in this case for the same reasons.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On FEB 21 1927 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Milton Halowell, Admr., etc.,
Plaintiff in Error,
vs.
Chicago, Rock Island & Pacific
Railway Company,
Defendant in Error,

Error to the Circuit Court
of La Salle County.

Jones, J.

This suit was instituted for the purpose of recovering damages from the defendant railway company on account of the death of Howard Halowell occasioned by a collision between an automobile truck in which he was riding, and one of defendant's passenger trains at a crossing near Ottawa, Illinois. A trial before a jury resulted in a verdict and judgment in favor of the defendant.

The defendant railway company operates a double track railroad extending west from Chicago through Ottawa and into Iowa and other western states. The highway running west from Ottawa is south of the railroad. Between the highway and the railroad is the Illinois and Michigan canal. A short distance north of the railroad is a range of Illinois River bluffs. At a point almost due south of the railroad tracks and 3.93 miles west of Ottawa, the public highway turns to the north, crosses a high bridge over the canal and then crosses the railroad right of way. This crossing is known as the "Moriarity Hill Crossing."

On March 10, 1920 plaintiff's intestate, a boy fifteen years of age, was in an automobile truck with Albert Windus and the latter's son Ernest. The elder Windus was driving and sat on the left hand side. Upon the same seat were his son and Howard Halowell. They were returning home from Ottawa where they had been in connection with some business of the elder Windus.

William Halswell, Admr., etc.,

Plaintiff in Error,

vs.

Chicago, Rock Island & Pacific Railway Company,

Defendant in Error,

Error to the Circuit Court of La Salle County.

Jones, J.

This suit was instituted for the purpose of recovering damages from the defendant railway company on account of the death of Harold Halswell occasioned by a collision between an automobile truck in which he was riding, and one of defendant's passenger trains at a crossing near Ottawa, Illinois. A trial before a jury resulted in a verdict and judgment in favor of the defendant.

The defendant railway company operates a single track railroad extending west from Chicago through Ottawa and into Iowa and other western states. The highway running west from Ottawa is south of the railroad. Between the highway and the railroad in the Illinois and Michigan canal. A short distance north of the railroad is a branch of Illinois River bluffs. At a point almost due north of the railroad tracks and 2.77 miles west of Ottawa, the public highway lays in the valley, crossing a high bridge over the canal and then crosses the railroad right of way. This crossing is known as the "Mortarity Hill Crossing."

On March 10, 1920 plaintiff's intestate, a boy fifteen years of age, was in an automobile truck with Albert Windus and the Ladder's son Thomas. The elder Windus was driving and sat on the left hand side. Upon the same seat were his son and Harold Halswell. They were returning home from Ottawa where they had been in connection with some business of his elder father.

As they were attempting to cross the railroad tracks they were struck by the defendant's passenger train No. 17, which had left Ottawa at 10:10 o'clock on the west bound or north tracks. This train was 18 minutes late. An east bound train left Utica at the same time No. 17 left Ottawa. No one on the west bound train was aware that it had collided with the truck; but the engineer and the fireman knew that something had happened because the blow-off cock on the south side of the engine was knocked off and the steam was rapidly escaping. The train was stopped as quickly as possible about one-quarter of a mile west of the crossing at 10:15 o'clock. About the time this train came to a stop, the east bound train on the south tracks whistled and went by No. 17. The escaping steam from the blow off cock was so dense, the engine-men on the east bound train were not able to see the automobile which had been struck by No. 17 and thrown onto or near the east bound tracks. As a result the east bound train struck the wreckage as it lay some distance west of the crossing and hurled the three bodies over east of the crossing. They were all badly mangled; and no parts of their bodies were found west of the crossing. However, most of the truck was found there.

The weight of the testimony shows that at the time of the accident, the day, though somewhat cloudy, was sufficiently clear for people to plainly see a distance of one-half mile. The railroad crossing was equipped with an automatic bell and on either side was a "Stop" sign. The automatic bell was shown to have been in good condition, having been tested the day before the accident.

The declaration consisted of ten counts but the 3rd, 4th, 5th, 6th, 9th and 10th were dismissed; the case was tried on the 1st, 2nd, 7th and 8th counts. The first count charged

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negligence in the operation of both of defendant's trains and that the plaintiff was struck by both and died as the result thereof. The second count was a general negligence count and charged that plaintiff's intestate came to his death from having been struck by one of defendant's engines and trains. The seventh count charged that the death was the result of the negligent operation of one of defendant's engines and trains in running them at a high rate of speed without ringing a bell or blowing a whistle or giving reasonable warning that the train was approaching the crossing; and that plaintiff's intestate was struck by said train and thrown between the two rails of the adjoining tracks and while unconscious but still alive was struck by an engine and train coming from the opposite direction, which train the defendant knew, or by the exercise of reasonable care could have known, would pass the point where plaintiff's intestate lay, and the defendant negligently failed to stop said approaching train. The eighth count was approximately the same as the seventh.

The question to be determined is whether the verdict for the defendant was warranted by the evidence and the law. It is contended by the plaintiff that the morning of the accident was dark and foggy; that the approaching train from Ottawa was traveling at a speed of approximately 90 miles an hour when it reached Moriarity crossing; that there was a curve a short distance east of the crossing which obstructed the train crew's view of the crossing and also obstructed the view of those in the automobile truck so that they could not see train No. 17 as it approached; that no proper warning was given of the approaching train and that its speed was excessive and dangerous under the circumstances.

Photographs taken at various points along the public highway south of the south rail of the railroad tracks as well as the testimony of witnesses on the trial conclusively show that notwithstanding the curve in the railroad track and the cloudy

condition of the weather, the occupants of the truck from the moment they turned north on the public highway to cross the canal and the railroad tracks, had an unobstructed view east along the tracks for at least half a mile. The extent of this view was not materially shortened at any place south of the tracks. No matter what the train's rate of speed may have been, there was nothing so far as the evidence shows, to prevent the intestate and those with him from looking to the east and seeing the train in apt time to have stopped the automobile and avoid the collision.

Counsel for plaintiff insists that the train was running 90 miles an hour. He arrives at his conslusion by mathematical deduction. The only witness who gave an opinion as to the rate of speed, said that ~~the~~ when the train went over the crossing it was going between 50 and 60 miles an hour. The scene of the accident was not within the corporate limits of any municipality and the speed of the train was not regulated by any rule or ordinance. At such a place the railroad company had an undoubted right to establish the speed of its train giving due regard, however, to the safety of passengers and also of persons in the exercise of ordinary care traveling on the highways over and across the tracks. (Partlow v. I.C. Ry. Co. 150 Ill. 321.) If the situation was such that a person about to cross the tracks, in the exercise of due care for his safety, could for a distance of a half mile or more see an approaching train, a speed of 50 or even 90 miles an hour cannot be said to constitute negligent operation of the train. In this case it was shown that from the point where the public highway turned north to the south rail of the railroad tracks was ~~62.8~~ 361 feet, and that the approaching train could have been seen by plaintiff's intestate throughout the entire distance.

He was a rugged strong boy 16 years of age, had been raised on a farm, and had been driving an automobile for at least a year. He was of sufficient age, intelligence, discretion and

condition of the weather, the occupants of the truck from the moment they turned north on the public highway to cross the road and the railroad tracks, had an unobstructed view along the tracks for at least half a mile. The extent of this view was not materially shortened at any place south of the tracks. No matter what the train's rate of speed may have been, there was nothing to bar the view of the railroad ahead, to prevent the intending and alert driver from looking to the east and seeing the train in ample time to have stopped the automobile and avoid the collision.

Counsel for plaintiff insists that the train was running 60 miles an hour. In writing at his crossing by automobile, exhibition. The only witnesses who gave an opinion as to the rate of speed, said that how when the train went over the crossing it was going between 50 and 60 miles an hour. The speed of the defendant was not within the corporate limits of any municipality, and the speed of the train was not regulated by any rule or ordinance. It took a place the railroad company had established right to establish the speed of its train giving due regard, however, to the safety of passengers and also of persons in the vicinity of railway cars travelling on the highways over and across the tracks. (Partlow v. I.C. Ry. Co. 180 Ill. 321.)

If the situation was such that a person about to cross the tracks, in the exercise of due care for his safety, could see a distance of a half mile or more as an approaching train, a speed of 60 miles an hour cannot be deemed to be a reasonable rate of speed in the vicinity of the track. In this case it was shown that from the point where the public highway turned north to the north rail of the railroad tracks was 63.5 feet, and that the approaching train could have been by plaintiff's intestate discovered in the entire distance.

He was a trained engineer of 16 years of age, had been raised on a farm, and had been driving an automobile for at least a year. He was of sufficient age, intelligence, discretion and

experience to understand and appreciate the danger of attempting to cross railroad tracks without taking the precaution to look and see whether or not a train was approaching. It was his duty to use his faculties in ascertaining the approach of the train and to warn the driver of the truck. (Pence v. Hines, 221 Ill. App. 584; Specht v. Chicago City Ry. Co., 233 id. 384; Greenstreet v. A. T. & St. F. Ry. Co. 234 id. 339.)

Whether or not the whistle was blown and the engine bell was rung were controverted questions upon the trial but we think the weight of the evidence largely preponderated in favor of the contention that such signals were given.

There were no eye witnesses to the accident and plaintiff in error insists that the evidence was sufficient to raise a presumption and establish a prima facie case of due care. Pursuant to that view upon this question he tendered to the court the following instruction:

> "The Court instructs the jury that if they believe, from the evidence in this case, that there was no eye witness to the death of the said Howard Halowell, then, in determining whether the said Howard Halowell was in the exercise of ordinary care, as the term is used in these instructions, the jury have the right to consider his habits for care, caution and sobriety, so far as the same are shown by the evidence, together with all the other evidence, facts and circumstances shown by the evidence in the case bearing upon that question, together with the presumption that a careful, prudent, cautious and sober person will act in accordance with the instinct of self preservation where there is a known danger to be avoided."

The evidence tended to show that the intestate was a sober, industrious boy but it did not disclose what were his habits as to prudence and the exercise of care and caution in the ordinary affairs of life. In cases where there are no eye witnesses, a plaintiff is not permitted to merely prove the accident which resulted in death, and then rely upon the instinct of self preservation common to all men to exercise due care and caution. He must go farther than that. He must prove

experience to understand and appreciate the danger of attempting to cross railroad tracks without taking the precaution to look and see whether or not a train was approaching. It was his duty to use his faculties in ascertaining the approach of the train and to warn the driver of the truck. (Jones v. Illow, 221 Ill. 4p. 584; Spaeth v. Chicago City Ry. Co., 238 Ill. 584; Cosgriffe v. A. T. & St. F. Ry. Co. 224 Ill. 488.)

Whether or not the mishap was known and the engine bell and the toot were contributing factors the fact did not be alone the weight of the evidence largely preponderated in favor of the contention that such signals were given.

There were no eye witnesses to the accident and plaintiff in error insists that the evidence was sufficient to raise a presumption and establish a prima facie case of due care. Inasmuch as that view upon this question is tendered to the court the following instruction:

> "The Court instructs the jury that if they believe, from the evidence in this case, that there was no eye witness to the death of the said Howard Halswell, then, in determining whether the said Howard Halswell was in the exercise of ordinary care, as the term is used in these instructions, the jury have the right to consider his habits for care, caution and safety, so far as the same are shown by the evidence, together with all the other evidence, facts and circumstances shown by the evidence in the case bearing upon that question, together with the presumption that a careful, prudent, cautious and sober person will act in accordance with the instinct of self preservation where there is a known danger to be avoided."

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the deceased's habits not only as to sobriety but as to prudence and the exercise of care and caution in the ordinary affairs of life. (Newell v. C.C.C. & St. L. Ry. Co. 261 Ill. 505.) As was said in that case, if there are particular facts present which would tend to throw any light upon the question of whether, at the time of the fatality, he was in the exercise of ordinary care, such facts may also be shown. In the absence of any proof of such habits or particular facts no recovery can be had because of the failure to prove that the decedent was in the exercise of due care at the time of receiving the injuries. Where there are eye witnesses due care must be proven from what actually occurred, but where there are no eye witnesses and no one to testify as to what decedent did, then proof of habits are admitted to raise a presumption. Therefore in the above quoted instruction it was not proper to say that proof of habits plus a presumption are to be considered in determining the question of due care. It is obvious that if there is no proof of habits of sobriety, prudence and care of the decedent in the ordinary affairs of life and no proof of particular facts showing due care, then there can be no presumption. The instruction was erroneous because it stated that the jury had the right to consider the decedent's habits for care, caution and sobriety, together with the presumption that a careful, prudent, cautious and sober person will act in accordance with the instinct of self preservation where there is a known danger to be avoided. There was no proof of habits of care and caution, hence there was no presumption.

All instructions given on behalf of the defendant are criticised as being erroneous. Some of the criticisms are not without merit. For instance one of the instructions told the jury that it was incumbent upon the plaintiff "to establish" his case by a preponderance of the evidence. The use of the

the deceased's habits not only as to sobriety but as to prudence and the exercise of care and caution in the ordinary affairs of life. (Mewsell v. C.O.C.O. & St. L. Ry. Co. 85 Ill. 305.) As was said in that case, if there are particular facts present which would tend to throw any light upon the question of whether, at the time of the fatality, he was in the exercise of ordinary care, such facts may also be shown. In the absence of any proof of such habits or particular facts so recovery can be had because of the failure to prove that the deceased was in the exercise of due care at the time of receiving the injuries. Where there are eye witnesses due care must be proven from what actually occurred, but where there are no eye witnesses and no one to testify as to what deceased did, then proof of habits are admitted to raise a presumption. Therefore in the above quoted instruction it was not proper to say that proof of habits like a presumption are to be considered in determining the question of due care. It is obvious that if there is no proof of habits of sobriety, prudence and care of the deceased in the ordinary affairs of life and no proof of particular facts showing due care, then there can be no presumption. The instruction was erroneous because it stated that the jury had the right to consider the deceased's habits for care, caution and sobriety, together with the presumption that a careful, prudent, cautious and sober person will act in accordance with the instinct of self preservation where there is a known danger to be avoided. There was no proof of habits of care and caution, hence there was no presumption.

All instructions given on behalf of the defendant are criticised as being erroneous. Some of the criticisms are not without merit. For instance one of the instructions told the jury that it was incumbent upon the plaintiff "to establish his case by a preponderance of the evidence. The use of the

word "establish" instead of "prove" has been repeatedly criticised and a few close cases have been reversed because of the error. In this case, however, both parties committed the same error. The plaintiff's sixth instruction contains the same vice as the defendant's instruction. Courts will not give heed to complaints made by one who has committed a like error. (West Chicago Street R.R. Co. v. Buckley, 200 Ill. 260; Funk v. Babbitt, 156 id. 408; C. & A. R. R. Co. v. Harrington, 192 id. 9). Although the defendant in error's instructions were by no means accurately drawn such a situation does not justify a reversal of a case in which substantial justice has been done. (Ford v. Ford, 257 Ill. 241; Mann v. Brady, 67 id. 95).

It is contended by plaintiff in error that the trial court erred in excluding competent evidence offered in his behalf. The witness, A'Hearn, engineer on the east bound train, was asked about an alleged conversation he had with engineer Connelly immediately before the coroner's inquest was held. The court properly sustained an objection to the question because it was incompetent for every purpose, unless it was intended to show that the witness had made statements out of court in conflict with his testimony on the trial. The witness was afterwards asked if he did not testify before the coroner that the train was standing when he was 1000 feet from it. Our attention is not called to the page in the abstract where this question is to be found, or to the ruling of the court upon it. The alleged error is not properly presented to us. But even if it were, the witness admitted that he had testified before the coroner and had signed the transcript of his testimony, and we can find no place in the abstract or record where his attention was called to any statement contained in the transcript, which was at variance with his testimony upon the trial. The same observation may be made concerning other questions propounded to

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It is contended by plaintiff in error that the trial court erred in excluding competent evidence offered in his behalf. The witness, A'Hearn, sequestered on the seat behind train, was asked about an alleged conversation he had with engineer Connelly immediately before the coroner's inquest was held. The court properly sustained an objection to the question because it was incompetent for every purpose, unless it was intended to show that the witness had made statements out of court in conflict with his testimony on the trial. The witness was afterwards asked if he did not testify before the coroner that the train was standing when he was 1000 feet from it. Our attention is not called to the page in the abstract where this question is to be found, or to the ruling of the court upon it. The alleged error is not properly presented to us. But even if it were, the witness admitted that he had testified before the coroner and had signed the transcript of his testimony, and we can find no place in the abstract or record where his attention was called to any statement contained in the transcript, which was at variance with his testimony upon the trial. The same observation may be made concerning other questions propounded to

this witness and to which objections were sustained. The court properly excluded the portion of the testimony of the witness Smith concerning the condition of the crossing bell between March 1st and March 10th, 1920. It appeared on cross examination that he was not able to say whether the bell was out of repair between those dates or not. But the witness, Clark, was permitted to testify generally on the condition of the bell. We think the rulings of the court upon the admission of testimony were substantially correct and that the plaintiff in error was not at all prejudiced by them.

An examination of the entire record fails to convince us that the verdict of the jury was unwarranted by the evidence. Indeed we are of the view that plaintiff failed to prove by preponderance of the evidence, either that the defendant was guilty of any of the acts of negligence charged in the declaration or that the deceased was in the exercise of due care for his own safety when he received his injuries.

Under our view of the case the verdict and judgment in the trial court were correct and should be affirmed.

Judgment affirmed.

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Under our view of the case the verdict and judgment in the trial court were correct and should be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 22nd day of Feb, in the year of our Lord one thousand nine hundred and twenty-seven

Justus L. Johnson

Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAR 7 - 1927 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

William H. Fiser,
appellee,

vs.

Chicago and North Western
Railway Company, and The
City of Rockford,
appellants.

Appeal from Circuit Court
of Winnebago County.

Partlow, P. J.

Appellee, William H. Fiser, recovered a judgment for $250 in the Circuit Court of Winnebago county against appellants, Chicago and North Western Railway Company and the city of Rockford, on account of damages to an automobile, and an appeal has been prosecuted to this court.

Several grounds of reversal are urged but it will be necessary to consider but one of them. The evidence shows that the automobile was damaged beyond repair. The only evidence offered by ~~appellant~~ appellee on the question of damages was that it would cost between $400 and $500 to repair the automobile; that two undamaged tires were worth $13.50 and that it was worth $12.00 to remove the automobile from the railroad track to a garage. Evidence was offered by appellants tending to show that, prior to the accident, the automobile was worth from $35 to $125. No evidence was offered as to the value of the automobile after the accident except as to the value of the two tires.

Where property has been injured by the negligence of another, and the property can be repaired, the measure of damages is the cost of restoring it to its former condition, provided the cost of repair does not exceed the market value of the article before the injury; but where the property has been destroyed and cannot be repaired, the measure of damages is the difference between the market value before the injury and the value of the wreckage.

William H. Fiser,

appellee,

vs.

Chicago and North Western Railway Company, and The City of Rockford,

appellants.

Appeal from Circuit Court of Winnebago County.

Hartlow, P. J.

Appellee, William H. Fiser, recovered a judgment for $250 in the Circuit Court of Winnebago county against appellants, Chicago and North Western Railway Company and the city of Rockford, on account of damages to an automobile, and an appeal has been presented to this court.

Several grounds of reversal are urged but it will be necessary to consider but one of them. The evidence shows that the automobile was damaged beyond repair. The only evidence offered by appellant on the question of damages was that it would cost between $400 and $500 to repair the automobile; that two undamaged tires were worth $13.50 and that it was worth $12.00 to remove the automobile from the railroad track to a garage. Evidence was offered by appellants tending to show that, prior to the accident, the automobile was worth from $35 to $125. No evidence was offered as to the value of the automobile after the accident except as to the value of the two tires.

Where property has been injured by the negligence of another, and the property can be repaired, the measure of damages is the cost of restoring it to its former condition, provided the cost of repair does not exceed the market value of the article before the injury; but where the property has been destroyed and cannot be repaired, the measure of damages is the difference between the market value before the injury and the value of the wreckage.

McDonnell v. Lake Erie and Western Railroad, 208 Ill. App. 442; Latham v. Cleveland, Cincinnati, Chicago and St. Louis Railroad Company, 164 Ill. App. 559; Crossen v. Chicago and Joliet Electric Railroad, 158 Ill. App. 42.

There is no competent evidence in this record on behalf of appellee to sustain the judgment. There is some evidence on behalf of ~~appellants~~ appellee, but the amount of the ~~damages~~ judgment is so in excess of the amount of the ~~judgment~~ damages that we are not justified in affirming the case.

The judgment will be reversed and the cause remanded.

Reversed and Remanded.

McDonnell v. Lake Erie and Western Railroad, 206 Ill. App. 440; Marlue v. Cleveland, Cincinnati, Chicago and St. Louis Railroad Company, 148 Ill. App. 528; Dossen v. Chicago and Joliet Electric Railroad, 198 Ill. App. 42.

There is no competent evidence in this record on behalf of appellee to sustain the judgment. There is some evidence on behalf of appellants, but the amount of the damages is so in excess of the amount of the judgment that we are not justified in affirming the case.

The judgment will be reversed and the cause remanded.

Reversed and Remanded.

TATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in nd for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, o hereby certify that the foregoing is a true copy of the opinion f the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of Mar. in the year of our Lord one thousand nine hundred and twenty-seven

Justus L. Johnson

Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAR 17 1927 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7622. Agenda 17

APRIL TERM 1926.

SAMUEL J. SLOAN, ADMINISTRATOR OF THE ESTATE OF HOMER SLOAN, DECEASED, APPELLEE	:	
VS.	:	APPEAL FROM THE CIRCUIT COURT OF IROQUOIS COUNTY.
CHICAGO AND EASTERN ILLINOIS RAILWAY COMPANY, A CORPORATION, APPELLANT.	:	

Jett, J

This suit was brought in the Circuit Court of Iroquois County by Samuel J. Sloan, Administrator of the estate of Homer Sloan, Deceased, Appellee, against the Chicago and Eastern Illinois Railway Company, Appellant, to recover damages on account of the death of said Homer Sloan, deceased, which was occasioned on the fifteenth day of March, 1924, at a railway crossing in the Village of Milford, in the said county of Iroquois.

It appears that Milford is a village of about fifteen hundred people. The main business street if Jones Street and runs east and west and is crossed by the tracks of appellant running practically due north and south. Three tracks of said company cross Jones Street. The deceased was driving east on Jones Street a few minutes after midnight and in attempting to cross the tracks of the appellant company on said street, the automobile in which he was riding and a moving train of cars of appellant, collided and resulted in the death of the plaintiff's intestate.

A jury trial was had, finding in favor of appellee in the sum of $2500.00, on which a judgment was rendered and this appeal by appellant followed.

The declaration consists of five counts. The first charges general negligence; the second charges the violation of the speed ordinance of the Village of Milford; the third that no bell

APRIL TERM 1926.

JOHN J. SLOAN, ADMINISTRATOR OF THE ESTATE OF HOMER SLOAN, DECEASED, APPELLEE, vs. CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, A CORPORATION, APPELLANT.	APPEAL FROM THE CIRCUIT COURT OF IROQUOIS COUNTY.

J.

This suit was brought in the Circuit Court of Iroquois by by Samuel J. Sloan, Administrator of the estate of Homer deceased, Appellee, against the Chicago and Eastern Illinois Company, Appellant, to recover damages on account of the of said Homer Sloan, deceased, which was occasioned on the month day of March, 1924, at a railway crossing in the Village Gilford, in the said county of Iroquois.

It appears that Gilford is a village of about fifteen and people. The main business street if Jones Street and runs north west and is crossed by the tracks of appellant running locally due north and south. Three tracks of said company cross street. The deceased was driving east on Jones Street a few rds after midnight and in attempting to cross the tracks of the ant company on said street, the automobile in which he was and a moving train of cars of appellant, collided and re- in the death of the plaintiff's intestate.

A jury trial was had, finding in favor of appellee in the $25,000.00, on which a judgment was rendered and this appeal appellant followed.

The declaration consists of five counts. The first general negligence; the second charges the violation of the ordinance of the Village of Gilford; the third that no bell

or whistle was rung or sounded as required by the statute; the fourth that the crossing was in a populous part of the village and on the main street and that the train was driven across the crossing at an unreasonably dangerous rate of speed; the fifth that the train was speeding over the crossing at a highly dangerous and unsafe rate of speed, and that the crossing which was in the center of the village and used both day and night by travellers and because of buildings, obstructions and other structures, the crossing was an unusually dangerous one.

To the declaration the appellant pleaded the general issue. A number of errors are assigned by the appellant for a reversal of the judgment. Two assigned errors are argued. The first is that the plaintiff's intestate was not in the exercise of due care and caution at the time of and immediately prior to the collision that resulted in his death. The second is that the court erred in the admitting of certain testimony that was offered on the part of the appellee, namely, the speed ordinance of the Village of Milford. In view of the conclusion that we have reached, it will be unnecessary to discuss any error or errors assigned other than the one relative to the admitting of the speed ordinance.

In the trial of the case the following sections of a certain ordinance of the Village of Milford was introduced over the objection of the appellant. The ordinance admitted reads as follows:

"RAILROADS

"Sec. 1--SPEED LIMIT--PASSENGER TRAINS--It shall be unlawful for any railroad company, railroad engineer, conductor, or other person to run or operate any locomotive, or train of passenger cars, upon or along any railroad track, side track, or switch, within the corporate limits of the Village of Milford, at a greater rate of speed than ten miles an hour.

"Sec. 3--PENALTY--Any railroad company or railroad corporation who shall, of themselves, or by their agents or employees, violate or fail to observe either of the foregoing sections of this chapter, or any railroad engineer, conductor, agent, or other employee of any such railroad company, or corporation, who shall violate or fail to observe either of the foregoing provisions of this chapter shall be subject to a fine of not less than Ten Dollars, nor more than Two Hundred Dollars, for each offense."

whistle was rung or sounded as required by the statute; the
ith that the crossing was in a populous part of the village and
the main street and that the train was driven across the crossing
an unreasonably dangerous rate of speed; the fact that the
in was speeding over the crossing at a highly dangerous and unsafe
e of speed, and that the crossing sign was in the center of the
lane and used both day and night by travellers and because of
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railroad track, side track, or switch, within the corp-
orate limits of the Village of Milford, at a greater
rate of speed than ten miles an hour.

"Sec. 3--PENALTY--Any railroad company or railroad
corporation who shall, of themselves, or by their agents
or employees, violate or fail to observe either of the for-
going sections of this chapter, or any railroad engineer,
conductor, agent, or other employee of any such railroad
company, or corporation, who shall violate or fail to
observe either of the foregoing provisions of this chapter
shall be subject to a fine of not less than Ten Dollars,
nor more than Two Hundred Dollars, for each offense."

It is the contention of appellant that since the adoption of the Public Utilities Act, now known as the Commerce Act, cities and villages organized under the City and Village Act have no power to regulate or enforce an ordinance regulating its speed of trains through a municipality.

In City of Witt vs. Cleveland, Cincinnati, Chicago & St. Louis Railway Co., an opinion was filed by the Supreme Court on the 16th day of February, 1927 which determines the question raised b by the admission of the ordinance complained of by the appellant. In its decision, the court among other things said: "APRIL 5, 1924 the city of Witt, a municipal corporation brought suit against appellant in a justice court for violation of an ordinance of the city of Witt regulating the speed of passenger and freight trains running through the city. The defendant was found guilty in the justice court and an appeal taken to the circuit court of Montgomery county. The case was there tried without a jury, and the defendant was found guilty and judgment entered for $50. and costs.of suit, and the case is now before this court on appeal from that judgment.

The ordinance under which this suit was instituted prohibits any railroad company to run, or cause or permit to be run within the limits of the city, any passenger train at a greater rate of speed than ten miles per hour, or any freight train, or locomotive engine not attached to a passenger train, at a greater rate of speed than five miles per hour, and provides a penalty for the violation of the ordinance. Defendant objected to the admission of the ordinance in evidence on the grounds that it is unreasonable in its terms, contrary to the commerce provision of the constitution of the United States, contrary to and in violation of the constitution of Illinois, and that since the enactment and passage of the Public Utilities Act of this State cities and villages are without power to pass ordinances regulating the speed of interstate or intrastate trains. Defendant's objections were overruled and the ordinance was admitted in evidence. Defendant excepted, and has assigned error on the

It is the contention of appellant that since the adoption
e Public Utilities Act, now known as the Commerce Act, cities no
illiance organized under the City and Village Act have no power
gulate or enforce an ordinance regulating the speed of trains
h a municipality.

In City of Mitt vs. Cleveland, Cincinnati, Chicago &
ouis Railway Co., an opinion was filed by the Supreme Court on
6th day of February, 1927 which determines the question raised b
e admission of the ordinance complained of by the appellant.
a decision, the court among other things said: "APRIL 5, 1924
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The ordinance under which this suit was instituted pro-
s any railroad company to run, or cause or permit to be run
n the limits of the city, any passenger train at a greater
of speed than ten miles per hour, or any freight train, or
otive engine not attached to a passenger train, at a greater
of speed than five miles per hour, and provides a penalty for
iolation of the ordinance. Attempt is made to the validity
e ordinance in question on the grounds that it is unreasonable
e terms, contrary to the commerce provision of the constitution
e United States, contrary to and in violation of the constitution
Illinois, and that since the constitution and laws of the State
the act of this state cities and villages are without power to
ordinances regulating the speed of interstate or intrastate trains.
court's objections were overruled and the ordinance was admitted
ence. Defendant excepted, and has assigned error on the

admission of the ordinance in evidence.

While prior to January 1, 1914, cities in this State had power to pass ordinances regulating the speed of trains while passing through such cities, the General Assembly by the passage of "An Act to provide for the regulation of public utilities," approved June 30, 1913, in force January 1, 1914, created the Public Utilities Commission, and by "An act concerning public utilities," approved June 29, 1921 in force July 1, 1921, (Laws of 1921, p. 702,) created the Commerce Commission and vested it with general supervision of all public utilities, including the power, by general or special orders, rules or regulations, or otherwise, to require every public utility to maintain and operate its plant, equipment or other property in such manner as to promote and safeguard the health and safety of its employees, passengers, customers and the public, and to this end to require the performance of any act which the health or safety of its employees, passengers, customers or the public may demand. (Laws of 1921, sec. 57, p. 733.) By this act the General Assembly, in its discretion, withdrew from cities and villages the power theretofore exercised by them with reference to the speed and operation of railway trains and such power is now vested in the Commerce Commission, another agency of the government. Village of Atwood v. Cincinnatti, Indianapolis and Western Railroad Co., 316 Ill. 425; Northern Trust Co. v. Chicago Railways Co. 318 id. 402.

On April 5, 1924, when this suit was brought, the city of Witt had no power to enact or enforce the ordinance in question. Its admission in evidence was therefore error."

In view of the holding in City of Witt against the Cleveland, Cincinatti, Chicago and St. Louis Railway Co., we are of the opinion that the court erred in the admitting of the ordinance of the said Village of Milford and the judgment of the Circuit Court of Iroquois County will be reversed and the cause remanded.

Reversed and Remanded.

[illegible] of the ordinance in evidence.

While prior to January 1, 1914, cities in this State [illegible] to pass ordinances regulating the speed of trains while [illegible] through such cities, the General Assembly by the passage [illegible] Act to provide for the regulation of public utilities," [illegible]oved June 30, 1913, in force January 1, 1914, created the [illegible]o Utilities Commission, and by "An act concerning public [illegible]ities," approved June 29, 1921 in force July 1, 1921, (Laws of [illegible], p. 702,) created the Commerce Commission and vested it with [illegible]ral supervision of all public utilities, including the power, [illegible]neral or special orders, rules or regulations, or otherwise, [illegible]quire every public utility to maintain and operate its plant, [illegible]ment or other property in such manner as to promote and safe-[illegible] the health and safety of its employees, passengers, customers [illegible] the public, and to this end to require the performance of any [illegible]hich the health or safety of its employees, passengers, customers [illegible]e public may demand. (Laws of 1921, sec. 57, p. 723.) By this [illegible] the General Assembly, in its discretion, withdrew from cities and [illegible]ages the power theretofore exercised by them with reference to [illegible]peed and operation of railway trains and such power is now vested [illegible]e Commerce Commission, another agency of the government. Village [illegible]ed v. Cincinnati, Indianapolis and Western Railroad Co., 316 [illegible] 425; Northern Trust Co. v. Chicago Railways Co. 318 id. 402.

On April 5, 1924, when this suit was brought, the city of [illegible] had no power to enact or enforce the ordinance in question. [illegible]ation in evidence was therefore error."

In view of the [illegible] in City of Witt against the [illegible]land, Cincinnati, Chicago and St. Louis Railway Co., [illegible] of [illegible] that the court erred in the admitting of the ordinance [illegible] in view of Milford and the judgment of the Circuit Court [illegible] reversed. County will be reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 17th day of March in the year of our Lord one thousand nine hundred and twenty-seven

Justus L. Johnson
Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAR 17 1927 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. BARNEY PETLICK and JANE DOE otherwise known as MRS. BARNEY PETLICK, Plaintiff in Error.	Error to the County Court of Lake County.

Jett, J.

The states attorney of Lake County filed an information in the County Court of said county, charging Barney Petlick and Jane Doe, otherwise known as Mrs. Barney Petlick, with a violation of the Illinois Prohibition Act. The information consists of two counts. The first charges the unlawful possession and the second the unlawful sale of intoxicating liquor. A jury trial was had and Barney Petlick was found not guilty. As to Mrs. Petlick the jury returned the following verdict: "We the jury find the defendant Mrs. Barney Petlick guilty in manner and form as charged in the information and recommend that the court show extreme leniency in passing sentence."

Motions for a new trial and in arrest of judgment were made and denied. Before judgment was rendered on the verdict the states attorney entered a nolle of the second count. The court sentenced Mrs. Barney Petlick, plaintiff in error, to sixty days in the County jail and it is from this judgment that the plaintiff in error prosecutes this writ of error.

The testimony on the part of the prosecution is to the effect that two officers went with a search warrant to search the premises of plaintiff in error and her husband. The evidence discloses that as they approached the premises and entered the yard the plaintiff in error ran into a corn field and was pursued by the officers and in her possession was found a bottle that contained intoxicating liquor. The evidence further shows that the officers found a bottle of moonshine whickey in the corn field into which plaintiff in error ran; that in the home of plaintiff in error a glass was found which smelled

[illegible] OF THE STATE [illegible]	
Defendant in error,	Error to the County
vs.	Court of Lake County.
[illegible] PETLICK and [illegible] [illegible] wise known as MRS. [illegible] PETLICK,	
Plaintiff in error.	

1.

The state's attorney of Lake County filed an information [illegible] County Court of said county, charging Barney Petlick and Jane [illegible] otherwise known as Mrs. Barney Petlick, with a violation of the [illegible] Prohibition Act. The information consists of two counts. [illegible] first charges the unlawful possession and the second the unlawful [illegible] of intoxicating liquor. A jury trial was had and Barney Petlick [illegible] found not guilty. As to Mrs. Petlick the jury returned the [illegible] ving verdict: "We the jury find the defendant Mrs. Barney Pet- [illegible] guilty in manner and form as charged in the information and re- [illegible] that the court show extreme leniency in passing sentence."

Motions for a new trial and in arrest of judgment were [illegible] and denied. Before judgment was rendered on the verdict the [illegible] a attorney entered a nolle of the second count. The court [illegible] sed Mrs. Barney Petlick. Plaintiff in error, to which he is in [illegible] county jail and it is from this judgment that the plaintiff in [illegible] proceeds this writ of error.

The testimony on the part of the prosecution is to the [illegible] that two officers went with a search warrant to search the pre- [illegible] of plaintiff in error and her husband. The evidence discloses [illegible] they approached the premises and entered the yard the plaintiff [illegible] ran into a corn field and was pursued by the officers and in [illegible] possession was found a bottle that contained intoxicating liquor. [illegible] illance further shows that the officers found a bottle of moon- [illegible] whiskey in the corn field into which plaintiff in error ran; [illegible] the home of plaintiff in error a glass was found which smelled

strongly of moonshine whiskey; that several men were sitting under a tree on the premises who had been drinking from a pitcher which smelled like beer and several glasses and bottles were there with foam in them; that in the opinion of the witness the pitcher had contained beer or home brew.

It is the contention of plaintiff in error that the bottle the prosecution claimed they found in her possession after they had pursued her into the corn field was medicine she had been taking for an illness; that the bottle contained a substance given to her by her son who brought it to the home of plaintiff in error and that she was taking it as medicine and for no other purpose. She denied knowing anything about the moonshine liquor the officer claimed to have found in the field. Plaintiff in error insists the men sitting under the tree drinking from a pitcher were strangers; that they had merely stopped under the shade tree in front of the house and borrowed a pitcher and some glasses.

A number of reasons are assigned for a reversal of the judgment but in view of the conclusion we have reached it will be necessary to discuss but one. On the trial of the case the court instructed the jury on the part of the People as follows: "The court instructs the jury in the language of the statute that after the going into effect of this Act, the possession of liquors by any person not legally permitted under this Act to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this Act. It shall not be unlawful to possess liquors in one's private dwelling only, provided such liquors were lawfully acquired and are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; a burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed and used." It is the contention of plaintiff in error that it was error for the court to give this

instruction. It will be observed that the instruction is in the language of section 40 of the Prohibition Act and it is claimed by defendant in error that a similar instruction was approved in People vs Beck, 305 Ill. 593. In that case an instruction quite similar to this one was under consideration in connection with Section 40 of the Prohibition Act, and it was there held that the provisions of Section 40 were constitutional, and were within the power of the legislature to pass, but it was not held that the giving of an instruction of this kind was proper under all circumstances. In the later case of People vs. Tate, 316 Ill. 52, this question was again before the court. The instruction in that case was, that the possession of intoxicating liquor by any one is prima facie evidence that such person keeps and possesses said liquor for the purpose of bartering and selling the same. The language of these instructions is not identical. The instruction now before us is that the possession of liquors by any person not legally permitted under the law to possess liquor shall be prima facie evidence, etc., while the instruction in the Tate case related to any person possessing intoxicating liquor, whether lawfully or otherwise. For this reason it might be argued that the Tate case is not authority for holding that the instruction herein given is improper, but on page 59 of that opinion the court held that when a defendant goes to trial and introduces evidence disputing the facts charged against him, it is then a question whether the evidence establishes a case against him beyond a reasonable doubt, and where there is such a contest in the evidence, there should be no instructions given as to what constitutes a prima facie case. There was a contest in the case now before us as to the possession of intoxicating liquor in violation of the law. Plaintiff in error went to trial upon that question, therefore there should have been no instruction given in the language of Section 40 of the Prohibition Act.

In People vs. Elmer Mizer and others, No. 7538, filed in this Court on May 29th, 1926, an instruction in the language of Section 40 of the Prohibition Act was given and the judgment of the court was

tution. It will be observed that the instruction is in the
ge of section 40 of the Prohibition Act and it is claimed by
that it appears that a similar instruction was approved in People vs
308 Ill. 358. In that case an instruction quite similar to this
as under consideration in connection with Section 40 of the Pro-
ion Act, and it was there held that the provisions of Section 40
constitutional, and were within the power of the legislature to
but it was not held that the giving of an instruction of this kind
proper under all circumstances. In the later case of People vs.
316 Ill. 52, this question was again before the court. The
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while the instruction in the Tate case related to any person
essing intoxicating liquor, whether lawfully or otherwise. For
reason it might be argued that the Tate case is not authority
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52 of that opinion the court held that when a defendant goes to
and introduces evidence disputing the facts charged against him,
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the possession of intoxicating liquor in violation of the law.
ntiff in error went to trial upon that question, therefore there
ld have been no instruction given in the language of Section 40
the Prohibition Act.

In People vs. Miner and others, No. 7558, filed in
court on May 27th, 1922, an instruction in the language of Section
of the Prohibition Act was given and the judgment of the court was

reversed because of the rule announced in the Tate Case.

In People vs. Levin, No. 7607 decided by this court on June 3rd, 1926, an instruction was given on the part of the People in the language of Section 40 of the Prohibition Act. The judgment in that case was reversed on account of the holding in the Tate case.

It was error, therefore, for the Court to give instruction No. 3 in this cause that is in the language of Section 40 of the Prohibition Act. For this reason the judgment of the County Court of Lake County is reversed and the cause remanded.

Reversed and Remanded.

was because of the rule announced in the Tate Case.

In People vs. Levin, No. 7607 decided by this court on [illegible], 1922, an instruction was given on the part of the People in [illegible] of Section 40 of the Prohibition Act. The judgment in [illegible] was reversed on account of the holding in the Tate case.

It was error, therefore, for the court to give instruction [illegible] in this case that is in the language of Section 40 of the [illegible]ition Act. For this reason the judgment of the County Court of [illegible] County is reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion, of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 17th day of March, in the year of our Lord one thousand nine hundred and twenty-seven

Justus L. Johnson
Clerk of the Appellate Court

abstract. 7702

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and twenty-six, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On MAR 17 1927 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

ED SLYMAN, Administrator of the Estate of ROSE SLYMAN, Deceased, Appellee, vs. METROPOLITAN LIFE INSURANCE COMPANY, Incorporated, Appellant.	Appeal from the County Court of Peoria County.

Jett, J.

This is an appeal from a judgment rendered upon the verdict of a jury in the suit of Ed Slyman, administrator of the estate of Rose Slyman, deceased, appellee, against Metropolitan Life Insurance Company, incorporated, appellant, for $467.02, upon a policy of insurance issued by appellant upon the life of Rose Slyman.

The declaration consists of one special count based upon the policy issued October 15th, 1923 by appellant. To the declaration appellant pleaded the general issue, plea of tender by which $4.50, premium paid upon said policy together with accrued costs was tendered into court, and a special plea alleging incorrect, false and fraudulent answers made by deceased to questions propounded to her as a basis for the issuance of the policy. It is alleged in said last special plea mentioned that appellant relied upon the information given by the deceased in answer to the questions propounded and that it had no knowledge until after the death of the deceased that the information given was incorrect, false and fraudulent. To the special plea alleging that the questions set forth as having been incorrectly, falsely and fraudulently answered appellee replied that the answers made were not by the deceased, Rose Slyman, but that the answers were supplied unknowingly on her part and without her consent, authority or direction; that she signed her name to the application without explanation as to the answers given and denies that she gave untruthful answers. Subsequently by leave of the court additional special pleas were filed by appellant setting forth various conditions of the policy which are as

...LTMAN, Administrator of the Estate of ROSE SLYMAN, Deceased, appellee, vs. METROPOLITAN LIFE INSURANCE COMPANY, Incorporated, appellant.	Appeal from the County Court of Peoria County.

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follows: "If, (1) the Insured is not alive or is not in sound health on the date hereof; or if (2) before the date hereof, the Insured has been rejected for insurance by this or by any other company, order or association, or has, within two years before the date thereof, been attended by a physician for any serious disease, or complaint, or, before said date, has had any pulmonary disease, or chronic bronchitis or cancer, or disease of the heart, liver or kidneys, unless such rejection, medical attention or previous disease is specifically inserted in the "space for Endorsements," on page 4 in a waiver signed by the Secretary; ******Then, in any such case, the Company ,may declare this policy void and the liability of the company in the case of any such declaration or in the case of any claim under this policy, shall be limited to the return of premiums paid on the policy, except in the case of fraud, in which case all premiums will be forfeited to the company."

The additional special pleas then alleged that Rose Slyman on the date of the issuance and delivery of said policy was not in sound health but that she was suffering from, to-wit: diseases of the lungs, to-wit: tuberculosis, and for a considerable time prior thereto had been suffering from and was affected by, to-wit: diseases of the lungs, to-wit: tuberculosis, of which fact the defendant was not advised and had no knowledge. The additional special pleas also set up the fact that the deceased had been within two years prior to the date of the issuance of the policy treated by various physicians and surgeons and had undergone a surgical operation which fact was not set forth in the space for endorsements and was unknown to appellant.

Appellee replied to the special pleas denying the allegations therein set forth and denying misrepresentations.

The evidence discloses that Rose Slyman was a Syrian; that she was unskilled in reading and writing the English language; that she could not intelligently write her name and was uneducated. The insurance was applied for by Rose Slyman on October 2, 1923, and the policy declared upon was issued to her on October 15th, 1923. All premiums

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were fully paid in accordance with the terms of the policy. Rose Slyman died February 20th, 1924 from tubercular meningitis. The necessary proofs were made on forms submitted by appellant, duly accepted by it and payment refused. The application and policy of insurance constitute the contract of insurance between the parties.

It is the contention of appellant that in the fall of 1922, the deceased had tubercular peritonitis and was treated from December 1922 until February 1923 by Dr. Knapp. It is further contended that she was operated upon by Dr. Hanna, on December 20th, 1922; that the operation consisted of the opening of the abdomen and removal of a large amount of fluid and that tuberculosis of the bowels was found and that it was necessary to provide drainage and she remained in the hospital until January 1923. It is further contended by the appellant that the evidence shows that from February 1923 for a period of four or five months the deceased was under the care of Dr. Cooper, who succeeded Dr. Knapp in treating her. It is also insisted that Rose Slyman was under a doctors care in February 1924 for a period of thirteen days at the end of which time she died from tubercular meningitis. Appellant relies upon the fact that the application signed by Rose Slyman discloses that she failed to advise the appellant of the fact that she was operated upon by Dr. Hanna, or was treated by Dr. Cooper, and that it also fails to disclose the fact that she was in the hospital under the care of Dr. Cooper for four or five months during the year 1923. It contends that the policy was issued within three months of the time the deceased had been under the care of Dr. Cooper and without giving the appellant information as to such treatment.

The record discloses that the application was taken by an agent of the appellant company by the name of Berry. It is fair to assume from what is disclosed by the record that the answers to the questions were written by the agent Berry. After questioning the applicant, as shown in part "B" of the application Rose Slyman in response to a question answered that she had had an "operation eight months

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In answer to a further question: "I have never been under treatment in any dispensary, hospital or asylum, nor been an inmate of any almshouse except 1 Month, 1-23."

Rose Slyman, applicant, was also examined personally by J. J. Toalson, examining physician for the appellant company, and reported on her health and application for insurance as follows: "This is to certify that upon the date last written I personally examined at the address given in part 'A' hereof, the life proposed for insurance and saw made the signature at the end of part 'C' and am of the opinion that said life is in good health and that said life's constitution is good. I find the pecuniary circumstances satisfactory and the insurance applied for in good faith with the purpose of being continued. I therefore recommend that this application be apcepted. Signed J. J. Toalson."

In view of the fact that the applicant was a foreigner uneducated, either in her own language or in the English language and for the reasons above mentioned, namely: (1) apprising the company of an operation eight months preceding the application for insurance; (2) informing the company of her treatment by Dr. Knapp; (3) confinement in a hospital in January 1923 for one month and (4) examination and report by the company's examining physician, a reasonable conclusion is that the deceased truthfully, honestly and in good faith without any attempt to misrepresent or defraud, answered the questions on the application to the best of her ability and understanding. The answers given and the examination by the physician were of such nature to cause the company to reject the risk if it did not think well of the applicant and it certainly knew if the application was perused that she had had a previous illness and that having gone through an operation it must have been of a serious nature. The company having all of this information before it and then issuing the policy thereon should it now be heard to

In answer to another question she replied, "I have not been under care of any physician within three years except", Dr. Knapp, Peoria, [illegible], Lee Davis 1-28."

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Rose Slyman died of an entirely different disease than that for which she was treated previously, having died from tubercular meningitis. The disease she had in December 1922 was tubercular peritonitis. The testimony shows that tubercular peritonitis is a different disease from tubarcular meningitis except as to cause. When she died in 1924 it was not from tubercular peritonitis according to the testimony of Dr. Knapp. It would appear therefore that the deceased had completely recovered from the previous illness and that her death was caused by an entirely different disease and that the deceased was in sound health at the time of her application for insurance.

An insurer may by its conduct waive a condition of a policy of life insurance limiting its liability to a return of the premium received if at the date of the policy the insured was not in good health.

Where an insurance company issues a policy on the life of a woman and accepts the premium therefor after she had informed the company's examining physician that four months previously she had submitted to an operation and two months later it consented to and issued a second policy on her life without any reference in her application as to her condition of health, the insurer waived the condition of the policy that its liability was limited to the return of the premiums received if the insured was not in good health at the date of the policy so as to prevent it asserting the defense to an action on the second policy that the insured died of cancer of the uterus. Eagleton vs. Prudential Life Insurance Co., 193 Ill. App. 306.

A warranty or representation as to the condition of health goes only to the extent of an honest and true statement of applicants belief/ Metropolitan Life Insurance Co., vs. Moravic, 116 Ill. App. 271.

The policy and application were prepared by the appellant company on their legal form for use for such insurance as applied for by Rose Slyman and many questions are lengthy and are susceptible to many and various answers, and for one unskilled the application was ambigious and should be construed strictly against the insurer in favor

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of the assured. Smith vs. Banker's Life Ass'n. 123 Ill. App. 392.

In the absence of proof by the company of fraud or intentional misstatement on the part of the insured the policy was not rendered invalid merely because the answers proved to be false. No representation is false in law unless it is made with actual knowledge of its falsity or under such circumstances that the law must necessarily impute such knowledge to the party at the time when he makes it. Mueller vs. N. Y. Life Insurance Co., 221 Ill. App. 420.

It is the contention of appellee that when Rose Slyman answered the questions propounded to her by the agent Berry and appellant's examining physician J. J. Toalson that by so answering, even though the answers are not as definite as they might be, they were so sufficiently and honestly answered as to apprise and inform the appellant that she did have a serious disease or illness necessitating the operation eight months preceeding the application for insurance. This was enough to put the appellant company on inquiry to ascertain further the nature of and result of the operation for the purpose of rejecting the risk if they so desired. Again when she stated that she had not been under the care of any physician for three years except Dr. Knapp of Peoria, Illinois and in answer to the question if she had ever been under treatment in any dispensary, hospital or asylum, or been an inmate of any almshouse or any other institution, and answering one month, was sufficient to put the appellant on inquiry to ascertain the physical condition of appellee for the purpose of rejecting the risk if it so desired. Appellant adduced no evidence to show that Rose Slyman was not in good health at the time of making the application on October 2, 1923. There is nothing to indicate that her statements in response to the questions propounded to her were not made in good faith or that they were other than honest and true statements of her belief.

It is also insisted by the appellant that it failed to endorse by its secretary in the space for endorsements on the policy as indicated in the conditions heretofore set out in this opinion. Failure to so endorse on the policy by appellant and the acceptance of the appli-

[illegible] N.Y. 111. App. [illegible].

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[illegible] proponded to [illegible] than honest and true statements of her belief.

It is also insisted by the appellant that it failed to endorse [illegible] the space for endorsements on the policy as indicated [illegible] the conditions heretofore set out in this opinion. Failure to [illegible] in the policy [illegible] and the acceptance of the appli-

cation with the knowledge of her previous condition as revealed in the application constituted a waiver on the part of the appellant precluding it from denying payment of the claim under the policy.

Complaint is made of the action of the court in modifying appellant's given instruction No. 1, and in the giving of appellees instruction No. 3. Instruction No. 3 given on the part of appellee related to the question of waiver by appellant of the provisions of the policy. We are of the opinion that the court did not err in giving said instruction. Modified instruction No. 1 complained of was more favorable to appellee than the rule would permit. We do not think appellant is in any position to complain of the modifying of the instruction because the position assumed by the appellant in said instruction is that under the facts in the case there could be no waiver at all.

We, conclude, therefore, that no reversible error was committed in the trial of this cause and that the judgment of the county court of Peoria County should be affirmed.

Judgment affirmed.

with the knowledge of her previous condition as revealed in the application constituted a waiver on the part of the appellant precluding her denying payment of the claim under the policy.

Complaint is made of the action of the court in modifying defendant's given instruction No. 1, and in the giving of appellee's instruction No. 4. Instruction No. 3 given on the part of appellee relates to the question of waiver by appellant of the provisions of the policy. We are of the opinion that the court did not err in giving the instruction. Modified instruction No. 1 complained of was more favorable to appellee than the rule would require. In so modifying it in any position in modifying of the instruction the position assumed by the appellant in said instruction would under the facts in the case then could be no waiver at all.

We, therefore, find no reversible error was committed in the trial of this cause and it is the judgment of the court that the judgment of the county court be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 17th day of Mar, in the year of our Lord one thousand nine hundred and twenty-seven.

Justus L. Johnson
Clerk of the Appellate Court

abstract

7655

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in the year of our Lord one thousand nine hundred and twenty-seven, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of y 13, 1927 the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

James W. Foraker, Appellee

v.

P. H. Slocum, Appellant

Appeal from Circuit Court
of
Will County

Jones J;

James W. Foraker, appellee, brought suit in the circuit court of Will County against P.H. Slocum, appellant to recover damages resulting from a collision of two automobiles. A trial was had before a jury resulting in a verdict and judgment for appellee in the sum of $525.

The collision occured in Joliet. Eastern Avenue runs approximately north and south and is intersected by Osgood Street which runs approximately east and west. Just prior to the accident appellant was driving a Ford Coupe south on Eastern Avenue and was approaching its intersection with Osgood Street. At the same time appellee was driving his car east on Osgood Street approaching the intersection from the west. The cars collided and as a result appellee's car was thrown on its left side with the front toward the west, about three feet east of the curb line of Eastern Avenue and a short distance south of the south line of Osgood Street. Appellant's car stood upright and facing south against the east curb of Eastern Avenue about 50 feet south of the intersection.

It is urged that the verdict is against the weight of the evidence and that the court gave three instructions on behalf of appellee which contain reversible error.

For 200 feet west of the intersection, Osgood Street has an incline of about 7 feet toward the intersection. Appellee testified that at the bottom of the grade his car was travelling less than 20 miles an hour and that when he reached the top of the grade at the west sidewalk line of Eastern Avenue, it was going less than 15 miles an hour; that as he came along Osgood Street he looked first to his right and saw no one coming, then he looked to his left at the top of the grade and went out into the street intersection; that when he looked to the left he saw appellant's car between 40 and 50 feet north of him on the right

es W. Yoraker, appellee

v.

H. Bloom, Appellant

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out into the street intersection; that when he looked to the left
as appellant's car between 40 and 50 feet north of him on the right

hand side of the street, and that he blew his horn as he saw appellant's car. He further testified that he was compelled to swerve to the right because Slocum's car hooked into his car and turned it over; and that the speed of Slocum's car was 30 miles an hour.

Appellant contends that he was travelling not to exceed 15 miles an hour and appellee's car was travelling from 35 to 40 miles an hour; that he looked both ways at the intersection and saw appellee's car about 80 feet distant; that after seeing it he swerved his car to the left and appellee's car ran into his car from the rear with such force that it landed across Eastern Avenue against the east curb.

There were no eye witnesses to the accident other than appellant and appellee. It was incumbent on appellee to prove that he was in the exercise of ordinary care for his own safety and that of his car, and that the collision was the result of appellant's negligence. These were questions of fact for the jury. We have examined the testimony and cannot say that the finding of the jury is manifestly against the weight of the evidence. In fact we think the evidence is sufficient to support the verdict. A reviewing court will not reverse a finding of a trial court upon questions of disputed fact unless the finding is clearly contrary to the weight of the evidence. (Noyes v. Hefferman 153 Ill. 339; Fahnestock v. City of Peoria 171 id. 454; Henderson v. Tobey 116 Ill. App. 539.)

It is claimed that appellee's 6th instruction failed to confine the jury in assessing damages to the amount claimed in the declaration and to the damage shown by the evidence; and that the 6th and 7th instructions fail to restrict the personal injuries and the damages to the car to such as were alleged in the declaration. The criticism of these instructions is not without some force, but we are not able to say that as given they were liable to mislead the jury. However, the 7th instruction does limit the right of recovery to such damages as are shown by the evidence.

Appellant also claims that the 7th instruction authorized the jury to allow damages for mental suffering and that there ~~was~~ were no averments in the declaration to authorize a recovery for such damages.

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to allow damages for mental suffering and that there was no

ence in the declaration to authorize a recovery for such damages.

The declaration avers that appellee was greatly bruised, hurt and wounded and divers cuts and wounds were inflicted upon his body, and he became and was sick, sore, lame and disordered and that he suffered great pain. A plaintiff is always entitled to recover all damages which are the natural and proximate consequence of the act complained of; and those damages which necessarily result from the injury are termed general and may be shown under general averments of the declarations. Only those damages which are not the necessary result of the injury are termed special and required to be stated specifically in the declaration. But the body and mind are so intimately connected that the mind is often directly and necessarily effected by physical injury. There cannot be severe physical pain without a certain amount of mental suffering. The mind, unless it is so overpowered that consciousness is destroyed, takes cognizance of physical pain and must be more or less affected thereby. We do not understand that the instruction or the admitted proof in this case contemplated any other mental suffering than that which was inseparable from the bodily injury; therefore no averment of special damages was necessary. (Chicago v. McLean 133 Ill. 148.)

The seventh instruction is criticised because it permitted the jury to allow future damages without an averment of such damages in the declaration. In West Chicago St. Railroad Co. v. McCallum 169 Ill. 240 an averment in almost the precise words of the declaration in this case was held sufficient to warrant an instruction for prospective damages. The testimony of appellee tends to show that he had not fully recovered at the time of the trial. Instructions as to future damages have been frequently upheld on similar evidence. (Swincsynski v. Kelly Coal Co. 151 Ill. App. 158; Rumpza v. Knickerbocker Ice Co. 148 id. 433; Shewbridge v. Chicago City Ry. Co. 188 Ill. 454; Kennedy v. Swift & Co. 234 id. 606.)

It is insisted that the 4th instruction on behalf of appellee is mandatory in form, and emphasizes the duty of the jury to consider certain elements of the case. The portion of the instruction complained of reads "The jury are instructed that the preponderance of evidence in a case is not, necessarily, alone determined by the number

declaration avers that appellee was greatly bruised, hurt and wounded; diverse cuts and wounds were inflicted upon his body, and he became sick, sore, lame and disordered and that he suffered great pain. Plaintiff is always entitled to recover all damages which are the natural and proximate consequence of the act complained of; and those damages which necessarily result from the injury are termed general and are shown under general averments of the declaration. Only those damages which are not the necessary result of the injury are termed special and required to be stated specifically in the declaration. But body and mind are so intimately connected that the mind is often greatly and necessarily affected by physical injury. There cannot be severe physical pain without a certain amount of mental suffering. Mind, unless it is so overpowered that consciousness is destroyed, is conscious of physical pain and must be more or less affected by it. We do not understand that the instruction or the admitted evidence in this case contemplated any other mental suffering than that which is inseparable from the bodily injury; therefore no averment of special damages was necessary. (Chicago v. Mohsen 153 Ill. 188.)

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It is insisted that the 4th instruction on behalf of appellee is defectively in form, and emphasizes the duty of the jury to consider certain elements of the case. The position of the instruction complained of is: "The jury are instructed that the preponderance of evidence in a case is not, necessarily, alone determined by the number

of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of evidence is, the jury should take into consideration not only the number of witnesses" but in addition thereto certain other enumerated elements. The giving of a similar instruction, although criticised in Lyons v. Chicago City Ry. Co. 258 Ill. 84 was held not to constitute reversible error. The court said:- "This court has refused to reverse because of the giving of instructions substantially like the one here in question." The instruction in the case at bar was faulty and it should have been modified or refused, but when considered with appellant's 19th given instruction which covers the point objected to, we cannot think the jury could have been misled. To justify a reversal on account of error it must appear from the record that upon another trial, if the same error does not intervene, a different result might be reasonably expected, so that the error would deprive the defendant of some material, substantial, legal right. Where it can be said from the record that the error assigned could not reasonably affect the result of the trial the judgment of the trial court should be affirmed. (Stansfield v. Wood 231 Ill. App. 586; People v. Heard 305 Ill. 319; People v. Weir 295 id. 268.) We do not believe that the error complained of affected the result or that if eliminated a different verdict might be reasonably expected upon another trial.

Finding no reversible error in the record the judgment of the circuit court is affirmed.

Judgment affirmed.

Jones

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Finding no reversible error in the record the judgment of
circuit court is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 13th day of May in the year of our Lord one thousand nine hundred and twenty-seven

Justus L. Johnson
Clerk of the Appellate Court

abstract

7664

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in the year of our Lord one thousand nine hundred and twenty-seven, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of May 13, 1927 the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The People of the State of Illinois,
Defendant in error,

v.

James E. Allen,
Plaintiff in error.

Error to Circuit Court of Winnebago County

Jones J:

Plaintiff in error, James E. Allen, whom we shall call the defendant, was convicted in the circuit court of Winnebago County of living in an open state of adultery. The indictment charged him with living with a "woman whose first name is Gertrude and whose last name or surname is unknown." The first count also describes her as a dark complexioned woman about five feet in height and of the age of about 45 years. A motion to quash the indictment was made on the ground that the name of the woman should have been alleged in the indictment, or if it could not be ascertained, it should have been alleged that her name was unknown to the grand jurors. The indictment was sufficient to inform the defendant that he and a woman, not his wife, had lived in an open state of adultery and to inform him of the nature of the charge. (People v. Green 276 Ill. 346.)

It is urged that the evidence is not sufficient to establish the guilt of the defendant as charged in the indictment. The testimony shows that he lived in an apartment building in the city of Rockford with Gertrude Allen, from sometime in December 1924, to the last of July 1925. He married Irene Mae Behring on April 24, 1925, in Chicago. She refused to go to Rockford to live with him and he continued to live there with the woman in question. He testified that Gertrude Allen was the widow of his deceased nephew and was only his housekeeper; that after his nephew died in 1909, she came to Indianapolis where he was then living and kept house for him; that he paid her $35 a month and paid for the upkeep of the house; that another nephew of his and a niece of hers lived with them; that they lived about two years in Indianapolis, moved to Detroit in 1911, and from there to Chicago in

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of hers lived with them; that they lived about two years in
napolis, moved to Detroit in 1911, and from there to Chicago in

1912, where they lived until 1920 or 1921; that the niece also lived with them in Detroit and Chicago until her marriage in 1920 or 1921; that Mrs. Allen's nephew lived with them in Chicago; that he, the defendant, then dis continued housekeeping until December, 1924, when he went to Rockford and engaged in business; and that he lived at a hotel temporarily, but being in ~~pr~~ poor health with stomach trouble he arranged with Mrs. Allen to keep house for him, agreeing to pay her the same as before.

The apartment they occupied is of the type usually called a "Kitchenette hotel apartment." It consisted of a living room, which was used at night as a bedroom. There was a double bed in this room which folds up and disappears behind a closed door ~~in~~ in the daytime. This was the only bed in the apartment. There was a sun parlor, a kitchenette, a dressing room and a bath. In the living room there was a davenport and other furniture. Defendant claims that the davenport was taken into the kitchenette each night and that he slept on it there. The hostess of the apartment-house testified that there was only one door into the kitchenette and that it opened from the sun parlor and was 29 inches wide. She also testified that the davenport was 35 inches wide, and 83 inches long. It appears from these dimensions and from a description of the furnishings of the kitchenette that there was not room in it for the davenport. There is considerable evidence in the record to the effect that the defendant held out Gertrude Allen as his wife, and introduced her as such although that evidence is denied by the defendant. The agent from whom he rented the apartment testified that the defendant said he wanted it for himself and wife. Two of his business associates testified that he introduced her to them as his wife; one of them stated that he spoke of her as his wife on other occasions.

A number of incriminating circumstances appear in evidence tending to show that he and Gertrude Allen lived together under such circumstances as was calculated to raise an inference that they did live together as ~~xxxx~~ man and wife. If the proof showed beyond a

reasonable doubt that they were in the habit of committing adultery together, than with the evidence that they were openly living together, the offense was proven. It may of course possibly be true, as claimed by the defendant, that no act of adultery ever occurred between them; but when men and women assume those relations, commit those indiscretions and surround themselves with the circumstances, which, by the common consent of mankind, based upon human experience and observation, lead to one conclusion--that of the existence of an adulterous relationship between them,--they can have no reason to expect that courts of justice will put a different interpretation upon their conduct and by some process of artificial reasoning refuse belief when all the world would be convinced. (Crane v. People 168 Ill. 395.)

It is urged that the court erred in instructing the jury that "in case you find the defendant guilty of adultery in manner and form as charged in the indictment or either of the counts thereof, then the form of your verdict may be 'We the jury find the defendant James E. Allen guilty in manner and form as charged in the indictment.'" The mere fact that plaintiff in error may have been guilty of adultery would not be sufficient to authorize his being convicted of living in an open state of adultery. Before one can be convicted under our statute the proof must show not only that the accused committed adultery but that he lived in an open state of adultery. The instruction is subject to criticism, but we feel, however, that the interests of the defendant were not prejudiced by its insufficiency because the 14th instruction given at his request stated explicitly to what extent the evidence must go to establish the charge as contemplated by the statute. Instructions are to be read as a series. Where a series of instructions embrace the law of the case when taken and considered together, and it appears from the record that substantial justice has been done and the law of the case has been substantially ~~given~~ given to the jury, the cause will not be reversed for slight error. (Kennedy v. People, 40 Ill. 488; Henry v. People 198 id. 162; Quigg v. People 211 id. 17.)

The statement of counsel for defendant that the court erred

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he proof must show not only that the accused committed adultery but
that he lived in an open state of adultery. The instruction is subject
to criticism, but we feel, however, that the interests of the defendant
were not prejudiced by its insufficiency because the fifth instruction
given at his request stated explicitly to what extent the evidence must
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a law of the case when taken and considered together, and it appears
from the record that substantial justice has been done and the law of
the case has been misunderstood by reason given to the jury, the cause will
not be reversed for slight error. (Kimball v. People, 42 Ill. 232;
Gray v. People 126 Ill. 168; Weiss v. People 131 Ill. 39.)

The statement of counsel for defendant that the court erred

in giving the 5th, 6th and 11th instructions for the People amounts to no more than an assignment of error, and as no reasons whatever are urged in support of the alleged error, it is waived. (People v. Hohimer 271 Ill. 515.)

It is insisted that the court erred in refusing instruction No. 1 offered by the defendant. The substance of defendant's refused instruction No. 1 was given in his 14th instruction. The refusal of proper instructions is not ground for reversal where others stating correctly the same principles are given. (Henry v. People, supra.) Other grounds for reversal are urged but we find no reversible error in the record and the judgment of the circuit court is accordingly affirmed.

Judgment affirmed.

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Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 13th day of May in the year of our Lord one thousand nine hundred and twenty-seven.

Justus L. Johnson
Clerk of the Appellate Court

abstract

7674

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in the year of our Lord one thousand nine hundred and twenty-seven, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of ay 13, 1927 the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

H.D. Morgan, appellant,

vs.

Reuben Baily Carson, et al,
appellees

Appeal from
Circuit Court
of Peoria County.

Jones J:

Appellant, H. D. Morgan, filed his bill in chancery in the circuit court of Peoria County against appellee, Reuben Baily Carson, et al, seeking to have two deeds absolute in form declared to be mortgages and to have the right to redeem therefrom. The bill was filed by Morgan as assignes of a judgment creditor of Charles W. Gruensfelder and Elizabeth Gruensfelder, his wife, and upon a hearing the chancellor dismissed it for want of equity.

In 1917 Elizabeth Gruensfelder held the record title to two pieces of property described in the two deeds in question. One of the tracts was encumbered for $3500 and the other for a slightly larger amount. There was still another encumbrance on both tracts for about $2500. In July, 1917, Elizabeth Gruensfelder and her husband conveyed the properties by separate deeds to appellee, Carson, subject to said encumbrances. There was a dwelling house in which the Gruensfelders lived on one of the properties, and a store building was on the other tract. Within a few days after the execution of the deeds, Carson leased the dwelling property for one year from August 1, 1917, to Charles W. Gruensfelder for $40 per month and a written lease was executed to that effect. On the same day or shortly thereafter, they executed an endorsement on the back of the lease whereby it was agreed that if the lessee's wife, who was then in a hospital, should die during the term of the lease, such death should terminate it on the first of the following month. She died and Gruensfelder surrendered possession to Carson. In a short time after the deeds were executed, appellee gave a written undated option to Gruensfelder to purchase all of the premises for $11,000 at any time within a year from the date of the option. There is a conflict in the evidence as to whether Gruensfelder attorned to appellee

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e evidence as to whether Grunenfelder attorned to appellee

and paid rent for the dwelling while he lived there, and as to whether he or appellee received the rent from the store building after the execution of the deeds.

By the amended bill, it is alleged that Elizabeth Gruensfelder was without funds to pay the note secured by one of the trust deeds and was fearful it would be foreclosed and applied to Carson for financial assistance; that she conveyed the premises to him as security for such sums as he might be required to advance to prevent foreclosure of the trust deeds and mortgages; that although the deeds appear to be absolute, it was expressly understood, intended and agreed by Elizabeth Gruensfelder and Carson that the deeds and the premises therein conveyed were to be held by Carson simply as security for such advances as he might, from time to time, be required to make to prevent foreclosure of the trust deeds and mortgages together with interest at 6% per annum; that said Elizabeth Gruensfelder would repay such advances and interest within thirty days after such advances were made, and that upon the repayment of the advances with interest, Carson would reconvey the premises to her.

The answer to Carson denied that he loaned to or for Elizabeth Gruensfelder any money and averred that at the time stated in the amended bill, he bought the premises from her, and that she conveyed the same to him in consideration of large sums of money advanced by him to her, and that the premises became and now are his absolute property; and that as a part of the consideration he discharged and had the encumbrances on the premises released.

A large number of witnesses were examined and the testimony is voluminous and conflicting. Gruensfelder testified on the behalf of appellant that in a conversation between his wife and Carson at the hospital, an arrangement was made for a loan and the conveyance of the property to Carson as security, substantially in conformity with the theory of the bill. He also testified that Carson demanded the lease be executed because Gruensfelder's creditors would know of the deeds, and that he asked Carson for something in writing to protect his and his wife's interest in the property and this request resulted in the giving

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By the amended bill, it is alleged that Elizabeth Gunnerfelder
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of the written option. All this Carson denied. A number of witnesses, two of whom are cousins of Gruensfelder, testified that his general reputation for truth and veracity is bad. Three of them also testified to conversations with him in which he had indicated that he had sold the property. Gruensfelder and two other witnesses testified that Carson's general reputation for truth and veracity was bad. The attorney who drew the papers testified that Gruensfelder and Carson were in his office a number of times; that they talked about making the deeds; that Mrs. Gruensfelder's acknowledgment would have to be taken at the hospital and that the substance of the proposition, as far as the deed was concerned, was that Carson was buying the property from Gruensfelder, and that Carson was to pay off the mortgages. He also testified that Gruensfelder and Carson figured up the balance that would come to Gruensfelder above mortgages, taxes, costs, etc., and agreed to an amount that would go to him; that he heard them talk about payment being made, and that there was never anything said or done in his office which would lead him to believe that the transaction was other than a bona fide sale. He further testified that nothing was said about the option at the time the deeds were delivered, but it was drawn later.

It is impracticable to review all of the evidence in this cause within the limits to which an opinion should be confined. Enough of it has been set out to show that there is an irreconcilable conflict in the testimony. In order for appellant to be entitled to the relief prayed for in his bill of complaint, it was incumbent upon him to establish the ~~xxxxxxxxxx~~ allegations of the bill by the greater weight of the evidence. Whether or not the allegations of the bill were established by that weight of the testimony was primarily a question for the chancellor. The burden is upon the party alleging that an instrument purporting to be a deed is in fact a mortgage, and it must be established by clear, satisfactory and convincing proof. (Kelly v. Lehmann 279 Ill. 33; Council v. Bernard 219 id. 392.) The law presumes in the absence of proof to the contrary that a deed is what it purports to be, that is to say, an absolute conveyance. The burden of proof is upon the party claiming such an absolute deed to be a mortgage, to

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sustain his claim by evidence, sufficient to overcome this presumption of the law. (Heaton v. Gaines 198 Ill. 479; Williams v. Williams 180 id. 361.) This, appellant has failed to do. After an examination of the testimony and exhibits in this case we are of the opinion that the chancellor did not err in dismissing the bill.

The decree of the circuit court of Peoria County is affirmed.

Decree Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 13th day of May in the year of our Lord one thousand nine hundred and twenty-seven

Justus L. Johnson

Clerk of the Appellate Court

7639

AT A TERM OF THE APPELLATE COURT,

egun and held at Ottawa, on Tuesday, the fifth day of April, in the year of our Lord one thousand nine hundred and twenty-seven, within and for the Second District of the State of Illinois:

resent--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
FLOYD S. CLARK, Sheriff.

May 26, 1927

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said ourt, in the words and figures following, to-wit:

7639 Agenda #5.

Cynthia J. Case,
Appellant

vs.

Charles V. Weddell
Appellee

Appeal from the
Circuit Court of
De Kalb County.

Jett, P. J.

This is the third time this case has been before this court on appeal from the Circuit Court of DeKalb County. Cynthia J. Case, the appellant, filed her suit against Charles V. Weddell, the appellee, to recover for losses alleged to have been sustained by her by the sale to her of certain shares of the capital stock of the United Agency, a credit rating corporation, through fraud and deceit. Cynthia J. Case, charged that Weddell, who was a Director of the United Agency, conspired with other directors and officers of the corporation, to mis-represent the true financial condition of the corporation to the public generally, to enable the corporation to sell its stock at prices far above its actual value. She charged that they did make such false representations to her; that relying upon them she purchased 750 shares of the capital stock of the corporation, paying therefor $16,394.00; and that she lost the entire purchase price.

Upon the first trial of this cause, the trial court instructed the jury to find the defendant not guilty at the close of plaintiff's evidence. Judgment was rendered against the plaintiff for costs in bar of the action.

The plaintiff appealed to this court where the judgment was reversed and the cause remanded to the Circuit Court of DeKalb County. When here for the first time the case was Number 7064.

The cause was again tried at the February Term, 1923, of that court and a verdict was rendered in favor of plaintiff for $20,969.83. Judgment was rendered on the verdict of the jury and Weddell, then appellant, appealed to this court. On the second hearing in this court the judgment of the Circuit Court was reversed because of the giving of erroneous instructions on the part of the plaintiff and the opinion was filed in Number 7264.

Cynthia J. Case,
Appellant

vs.

Charles V. Waddell
Appellee

Appeal from the
Circuit Court of
De Kalb County.

No. 1.

This is the third time this case has been before this court on
appeal from the Circuit Court of DeKalb County. Cynthia J. Case, the
plaintiff, filed her suit against Charles V. Waddell, the appellee, to
recover for losses alleged to have been sustained by her by the sale
to her of certain shares of the capital stock of the United Agency, a
joint trading corporation, through fraud and deceit. Cynthia J. Case,
charged that Waddell, who was a Director of the United Agency, conspired
with other directors and officers of the corporation, to mis-represent
the true financial condition of the corporation to the public generally,
and enable the corporation to sell its stock at prices far above its
actual value. She charged that they did make such false representations
to her; that relying upon them she purchased 750 shares of the capital
stock of the corporation, paying therefor $16,394.00; and that she lost
the entire purchase price.

Upon the first trial of this cause, the trial court instructed
the jury to find the defendant not guilty at the close of plaintiff's
evidence. Judgment was rendered against the plaintiff for costs in her
behalf in the action.

The plaintiff appealed to this court where the judgment was reversed
and the cause remanded to the Circuit Court of DeKalb County. Then
and for the first time the case was Number 7064.

The cause was again tried at the February Term, 1923, of that court
and a verdict was rendered in favor of plaintiff for $20,969.83.
A judgment was rendered on the verdict of the jury and Waddell, then appel-
lant, appealed to this court. On the second hearing in this court the
judgment of the Circuit Court was reversed because of the giving of
certain instructions on the part of the plaintiff and the opinion
filed in Number 7264.

The opinion rendered by this court on the first appeal of this cause contains a full and complete statement of all the facts in the case as they appear from the evidence offered by the plaintiff. In the first opinion we held that the evidence of the plaintiff fairly tended to support the averments of the declaration; that whether this evidence showed fraud and conspiracy was a question of fact for the jury which should have been submitted to it. From an examination of the record it appears that the testimony as disclosed by the record on this appeal, is very similar to what it was on the second appeal.

We do not deem it necessary to make a detailed statement of the facts in this case. The testimony on the part of the appellee tends to prove his contention. The evidence fairly tends to show that the statements made by Weddell were made in good faith and believed by him to be true. It was a question of fact as to whether or not the defendant Weddell had conspired with others to sell the stock of the United Agency by means of fraudulent representations.

In passing, it might be well to state that the record discloses that at the time of the sale of the stock to the plaintiff she lived with her husband Francis M. Case, and her daughter Miss Stella Case, in Paw Paw, Illinois; that the actual sales of stock to the plaintiff were made by A. L. Morris, a stock salesman of the United Agency. Morris had previously sold some stock of the United Agency to Dr. William Avery, who was a practicing physician in Paw Paw, and was, at the time of the sale of the stock to the plaintiff, and for some years prior thereto, had been rooming at the home of the plaintiff and her husband. After Morris sold the stock to Dr. Avery, the doctor introduced Morris to Stella Case, and shortly thereafter, in May 1917, he sold 5 shares of stock to her. Dr. Avery or the daughter, afterwards introduced Morris to the plaintiff, and he made three sales of stock to her. The first sale was made on June 7, 1917, of 137 shares of stock, and the purchase price was $3000.00; the second sale was made August 18th, 1917, of 513 shares of stock, and the purchase price was $11,300.00; the third sale of stock was arranged for in November or December of 1917, and finally

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first appeal.

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facts in this case. The testimony on the part of the appellee tends
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made on June 7, 1917, of 137 shares of stock, and the purchase
$3000.00; the second sale was made August 18th, 1917, of 313
of stock, and the purchase price was $11,800.00; the third sale
was arranged for in November or December of 1917, and finally

completed February 20, 1918, and was of 65 shares of stock and the purchase price was $1495.00.

There is nothing in the record so far as we have been able to ascertain, to show that the defendant had anything to do with the sale of this stock to the plaintiff, or that he knew that an effort was being made by any person to sell stock to her. The record shows that the plaintiff has known of the defendant for years, as an honest man of good business judgment, but had never met him personally but once, and that was on February 20, 1918, at the office of the United Agency in Chicago, where the plaintiff went with her daughter to complete the purchase of the last block of 65 shares of stock, which she had previously agreed to pruchase. It appears that the only conversation that the plaintiff ever had with the defendant was at the time she met him on February 20, 1918; in that conversation the plaintiff testifies she said "Mr. Weddell, I would like to know what your opinion is about the United Agency Stock," and he said "I don't think there is any better, I don't think there is any better investment that I know of"; and she further testified; "And of course that sounded kind of encouraging, and I knew that he was a farmer and a good business man and I thought he must see something about it or he wouldn't buy into it."

The record further discloses that Dr. Avery testified that he had a conversation with the defendant about July 15, 1917, about United Agency stock and that he told Weddell that he and Mrs. Case were going to "rely on his judgment in this investment," and that the defendant said "it was one of the best, if not the best investment, that he knew of in the United States; that he was putting his surplus money in the company, and he couldn't help but advise others to do the same," and Dr. Avery communicated this statement to the plaintiff within a few days.

The above and foregoing are the only representations or statements shown by the record to have been made personally by the defendant.

It is the contention of appellant that the cause should be reversed upon the facts. After a careful examination of the record we are not prepared to set aside the finding of the jury and reverse and remand the case for a new trial upon the ground that the verdict is contrary to

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[illegible] price was $1492.00.

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It is the contention of appellant that the cause should be reversed
the trial. After a careful examination of the record we are not
ed to set aside the finding of the jury and reverse and remand the
for a new trial upon the ground that the verdict is contrary to

the manifest weight of the evidence.

It is insisted that a number of instructions given on the part of appellee are erroneous. They are not argued in the order in which they were numbered. The most serious objection seems to be to instruction number 8, which is first criticised by appellant. Instruction Number 8 is as follows: "The Court instructs the jury as to the question of conspiracy as charged in plaintiff's declaration, that the burden of proof is upon the plaintiff, to prove by credible evidence, by the greater weight of the testimony, that the defendant, Weddell, is guilty as charged in plaintiff's declaration of a conspiracy to defraud the public generally, and the plaintiff in particular, in the purchase of the stock of the United Agency; and if the jury finds from the evidence that the defendant Charles V. Weddell, did not enter into a conspiracy as charged in plaintiff's declaration, then as to the charge of conspiracy, the court instructs you that the same cannot be made a basis for recovery as against the defendant Charles V. Weddell.

It is insisted by appellant that she did not allege in her declaration that Weddell conspired to defraud the plaintiff in particular, and it is contended the instruction mistates a material element of the declaration. This is a misapprehension. Where several are charged in a declaration in an action of deceit as being engaged in a conspiracy of which the deceit was a part, they are not liable merely because they have entered into a conspiracy. Entering into a conspiracy to do an illegal act or a legal act by illegal means, is of itself a criminal offense, but no right of action against the conspirators arises until some person is individualized from the public by acting to his injury upon false representations, made by one of the conspirators, in furtherance of his object. The conspiracy is not, as in a criminal case, the gist of the action of deceit. It is the means by which the defendant may be held liable for the actions or knowledge of other persons. An examination of the declaration and each count thereof, discloses that it charges a conspiracy and in legal effect, is a charge to defraud the public generally and the plaintiff in particular.

manifest weight of the evidence.

It is insisted that a number of instructions given on the part of defendants are erroneous. They are not argued in the order in which they are numbered. The most serious objection seems to be to instruction Number 4, which is first criticised by appellant. Instruction Number 4 is as follows: "The Court instructs the jury as to the question of conspiracy as charged in plaintiff's declaration, that the burden of proof is upon the plaintiff, to prove by credible evidence, by the greater weight of the testimony, that the defendant, Weddell, is guilty of conspiracy in plaintiff's declaration of a conspiracy to defraud the United generally, and the plaintiff in particular, in the purchase of cattle of the United Agency; and if the jury finds from the evidence that the defendant Charles V. Weddell, did not enter into a conspiracy charged in plaintiff's declaration, then as to the charge of conspiracy, the court instructs you, that it is your duty to find a verdict in favor as against the defendant Charles V. Weddell.

It is insisted by appellant that not did not allege in his declaration that Weddell conspired to defraud the plaintiff in particular, and that condemned the instruction mistates a material element of the conversation. This is a misapprehension. Where several are charged in a declaration to be a section of deceit as being engaged in a conspiracy to defraud the deceit was a part, they are not liable merely because they were entered into a conspiracy. Entering into a conspiracy to do an illegal act or a legal act by illegal means, is of itself a criminal offense, but not right of action against the conspirators arises only if some person is injured from the conspiracy or acting to his detriment upon false representations, made by one of the conspirators, in pursuance of his object. The conspiracy is not, as in a criminal case, the gist of the action of deceit. It is the means by which the defendant may be held liable for the actions or knowledge of other persons. Examination of the declaration and such cases therein, disclosed that conspiracy and in legal effect, is a course to defraud the generally and the plaintiff in particular.

The instruction is not a peremptory one so as to bring it within the rule announced in Schwartz Admx. Appellee vs. C. & N. Northwestern Ry. Co. in case 7396, this court, as contended by appellants. It conforms to the charge as made in the declaration and each count thereof. We are of the opinion that there is no merit in the objections to said instruction number 8. It cannot be said to be misleading when considered in connection with instruction number 4, given on the part of appellant. Instruction number 4 is as follows:-

"The jury are instructed that if you find from the preponderance of the evidence under the instructions of the court that the defendant Reddell, conspired with others to sell the stock of the United Agency by means of fraudulent representations; and you further find that any one or more of such conspirators personally, or through an agent or agents, made a statement or representation which falsely represented the financial condition of the United Agency; and if you further find from the evidence that such conspirator or conspirators, knew said statement or representation was false; and if you further find from the evidence that said statement or representation was made for the purpose of selling United Agency stock; and if you further find from the evidence that the plaintiff learned of said statement or representation, and if you further find from the evidence that the plaintiff acted as an ordinary prudent person, and relied upon such statement or representation in the purchase of United Agency stock, then the plaintiff is entitled to recover and you should find the defendant guilty."

It is next insisted by the appellant that the court erred in giving instruction No. 3, on the part of appellee. It is said that instruction No. 3 ignores the element of conspiracy. It only requires a reading of the instruction to show that it is not subject to the criticism made of it. Instruction No. 3 is as follows:- "The court instructs the jury that to sustain an action of this kind it is essential that statements material to the transaction should have been made; that such statements should have related to a past or existing fact, and not to some future event; that the statements should be false in a material respect; that the person against whom the charge is made should have known at the

The instruction is not a peremptory one so as to bring it within the rule enunciated in Schwartz Adams. Appellee vs. C. & N. Northwestern R. Co. in case 7396, this court, as contended by appellants. It contains the charge as made in the declaration and each count thereof. We are of the opinion that there is no merit in the objections to said instruction number 8. It cannot be said to be misleading when considered in connection with instruction number 4, given on the part of appellant. Instruction number 4 is as follows:-

"The jury are instructed that if you find from the preponderance of the evidence under the instructions of the court that the defendant Hall, conspired with others to sell the stock of the United Agency Company of fraudulent representations; and you further find that any one or more of such conspirators personally, or through an agent or otherwise, made a statement or representation which falsely represented the financial condition of the United Agency; and if you further find from the evidence that such conspirator or conspirators, knew said statement or representation was false; and if you further find from the evidence that said statement or representation was made for the purpose of selling United Agency stock; and if you further find from the evidence that the plaintiff learned of said statement or representation; and if you further find from the evidence that the plaintiff was an ordinary prudent person, and relied upon such statement or representation in the purchase of United Agency stock, then the plaintiff entitled to recover and you should find the defendant guilty."

It is next insisted by the appellant that the court erred in giving instruction No. 3, on the part of appellee. It is said that instruction ignores the element of conspiracy. It only requires a reading of instruction to show that it is not subject to the criticism made of instruction No. 3 is as follows:- "The court instructs the jury that in an action of this kind it is essential that statements made to the transaction should have been made; that such statements were related to a past or existing fact, and not to some future event; that the statements should be false in a material respect; that the plaintiff upon the credit of which he made should have known at the

time the statements were made that they were false; that the plaintiff should have relied upon the statements so that ~~thaya~~ they are the material inducing cause which influenced her action, and that she should have suffered damage as a result."

Furthermore, it will be observed that the instruction starts out by saying that to sustain an action of this kind it is essential that statements material to the transaction should have been made. When this instruction is considered in connection with the issue formulated in this cause it cannot be said to be subject to the criticisms made thereto by appellant.

It is also the contention of appellant that instruction No. 9, given by appellee is erroneous. It is insisted that it is bad because it told the jury that Weddell had a right to rely in good faith on the valuation of the assets of the United Agency made by appraisers in good faith and upon statements as to such value made by other directors or officers of the United Agency in good faith. On examination it will be found that instruction No. 9 told the jury that Weddell had a right to rely in good faith upon the various things enumerated in the instruction in so far as they were shown by the evidence, provided the jury further believed from the evidence that Weddell believed the same to be true and relied upon the same and that he acted as a reasonably prudent man." The instruction is not peremptory and it does not assume that Weddell acted in good faith, nor does it invade the province of the jury in any respect for the reason that the jury is referred to the evidence for its determination, as to the good faith of Weddell. We do not think reversible error was committed in the giving of instruction No. 9.

Appellant also insists that instruction No. 2 given on the part of appellee is erroneous. This instruction is as follows: "The court instructs the jury that fraud is never to be presumed, but must be affirmatively proved by the party alleging the same. The law presumes that all men are fair and honest -- that their dealings are in good faith and without intention to defraud others, and if any transaction called in question is equally capable of two constructions, one that is

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, and without intention to defraud others, and if any transaction
d in question is equally capable of two constructions, one that is

fair and honest and the other that is dishonest, then the law is that the transaction questioned is presumed to be honest and fair."

The part of the instruction to which the objection is argued was under consideration of this court in Alexis Stoneward Manufacturing Company v. Young, 59 Ill. App. 226. The defendants third refused instruction in that cause was substantially identical with that part of the instruction criticised in the case at bar, and the court said: "We think that the third refused instruction should be given. It is proper for the jury to understand that good faith of appellant's officers would be presumed unless the contrary appeared from the evidence." A like instruction was under consideration in Schroeder v. Walsh, 120 Ill. 403. The same objection was argued there as is argued here and the court said that the instruction was not obnoxious to the objection made to it.

Hughes v. Lockington, 221 Ill. 571, was a case for fraud and deceit. The fourth instruction given on the part of appellant was modified by the court and in its decision at page 575 the court said:

> "Complaint is also made of the modification by the court of the fourth instruction offered and given on behalf of appellant. This instruction was to the effect that the law presumes that all men are fair and honest and that their dealings are in good faith and without intent to cheat and defraud others, and where a transaction is called in question and is equally capable of two constructions, one that is fair and honest and the other that is dishonest, the law is that the fair and honest construction must prevail. The instruction was modified by the court by the addition of the words, "unless proven by the preponderance of the evidence to be otherwise." The instruction as originally submitted stated a correct proposition of law, and it would not have been error for the court to have given it as offered, but the modification did not render it erroneous or misleading. In other words, the additional language did not materially change the meaning of the instruction."

Other objections are argued to the instructions. We have considered them and taking the instructions as a series, we are unable to say that the jury were misled by the instructions given on the part of appellee. There being no reversible error found in the instructions and the jury having passed upon the questions of fact and having found against the

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The part of the instruction to which the objection is argued was er consideration of this court in Alexis Microscopic Manufacturing pany v. Young, 20 Ill. App. 526. The defendants tried refused truction in that cause was substantially identical with that part of instruction criticized in the case at bar, and the court said: think that the third refused instruction should be given. It is per for the jury to understand that good faith of appellants iers would be presumed unless the contrary appeared from the evidence." ike instruction was under consideration in Schroeder v. Weigel, 120 Ill. . The same objection was argued there as is argued here and the rt said that the instruction was not obnoxious to the objection made it.

Hughes v. Lochington, 221 Ill. 571, was a case for fraud and deceit. fourth instruction given on the part of appellant was modified by court and in its decision at page 575 the court said:

"Complaint is also made of the modification by the court of the fourth instruction offered and given on behalf of appellant. This instruction was to the effect that the law presumes that all men are fair and honest and that their dealings are in good faith and without intent to cheat and defraud others, and where a transaction is called in question and is equally capable of two constructions, one that is fair and honest and the other that is dishonest, the law is that the fair and honest construction must prevail. The instruction was modified by the court by the addition of the words, "unless proven by the preponderance of the evidence to be otherwise." The instruction as originally submitted stated a correct proposition of law, and it would not have been error for the court to have given it as offered, but the modification did not render it erroneous or misleading. In other words, the additional language did not materially change the meaning of the instruction."

Other objections are argued to the instructions. We have considered and taking the instructions as a series, we are unable to say that jury were misled by the instructions given on the part of appellee. e being no reversible error found in the instructions and the jury on passed upon the questions of fact and having found against the

contention of appellant, we are of the opinion that the judgment of the Circuit Court should be affirmed which is accordingly done.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 26th day of May in the year of our Lord one thousand nine hundred and twenty-seven

Justus L. Johnson
Clerk of the Appellate Court

abstract

7678

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in the year of our Lord one thousand nine hundred and twenty-seven, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On May 31, 1927 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

S. B. Geiger, appellant,

v.

City of Rockford, appellee,

Appeal from the Circuit Court of Winnebago County.

Jones J:

Appellant, S. B. Geiger, instituted a suit in the circuit court of Winnebago County against the city of Rockford, appellee, to recover $4915.47, claimed to be due for extra work and material furnished in the digging of two artesian wells Nos. 2 and 3, under a written contract by which appellant was to sink four deep wells for appellee.

The contract is voluminous and includes numerous specifications. The wells were to have an inside diameter of 14 inches for a depth of 300 feet, and 12 inches inside diameter for a further depth of 1200 to 1300 feet into the Potsdam formation, until a depth satisfactory to the engineer was reached, but not to exceed a total depth of 1600 feet. The first or upper portion of the 14 in. section was to be provided with a drive pipe 15 inches outside diameter extending into the rock, a depth of 110 feet, sealing off all surface or ground water. The specifications contain the following clause: "Geological strata: It is believed that the Galena and Trenton Limestone such as may be seen in the various quarries in and around the city of Rockford, underlies the proposed sites of the wells at depths below the surface not to exceed twenty-five (25') to fifty feet ~~(50')~~ (50'). At the Emmerson-Brantingham Company's well, west of the city well sites the distance to rock was twenty-two feet (22') through clay. It is believed that the St. Peter sandstone will be encountered at a depth of approximately one hundred eighty feet (180') more or less below the surface. Below this will be found, the following deposits of the general nature and approximate thicknesses named:

Name	Thickness
St. Peter Sandstone	200' to 500'
Lower Magnesian Limestone	
Charts, Dolomite and shales	90' to 180'
Potsdam deposits, Sandstone and Shale	1500' or more

"The strata are liable to variations in thickness and structure,

B. Geiger, appellant,

v.

, of Rockford, appellee,

Appeal from the
Circuit Court of
Winnebago County.

ee 1:

Appellant, B. B. Geiger, instituted a suit in the circuit court Winnebago County against the city of Rockford, appellee, to recover 15.47, claimed to be due for extra work and material furnished in digging of two artesian wells Nos. 2 and 3, under a written contract hich appellant was to sink four deep wells for appellee.

The contract is voluminous and includes numerous specifications. wells were to have an inside diameter of 14 inches for a depth of feet, and 12 inches inside diameter for a further depth of 1200 to feet into the Potsdam formation, until a depth satisfactory to the eer was reached, but not to exceed a total depth of 1600 feet. first or upper portion of the 14 in. section was to be provided with ive pipe 18 inches outside diameter extending into the rock, a depth 10 feet, sealing off all surface or ground water. The specifications in the following clause: "Geological strata: It is believed that lens and Trenton Limestone such as may be seen in the various ities in and around the city of Rockford, underlies the proposed sites the wells at depths below the surface not to exceed twenty-five (25') ifty feet (50'). At the Emmerson-Brantingham Company's well, of the city well sites the distance to rock was twenty-two feet through clay. It is believed that the St. Peter sandstone will be tered at a depth of approximately one hundred eighty feet (180') or less below the surface. Below this will be found, the following ite of the general nature and approximate thicknesses named:

Name	Thickness
Peter Sandstone	200' to 500'
er Magnesian	
estone	
rts, Dolomite	
shales	30' to 180'
ndam dolomite,	
dstone and	
le	
	1500' or more

"The strata are liable to variations in thickness and structure.

which variations shall be at the risk of the contractor, and said contractor shall not be entitled to any claim for extra compensation for any variations in said strata, or for any additional labor, material or appliances which he is obliged to furnish by reason of such variations or from any unforseen difficulty encountered in the prosecution of the work."

The contract further provides that all loss or damage arising out of the nature of the work to be done or from the action of the elements or from any unforseen circumstances in the prosecution of the same, or from unusual obstructions or difficulties which may be encountered in the prosecution of the work shall be sustained and borne by the contractor at his own cost and expense. It further provides that no work should be regarded as extra work unless it was ordered in writing by the consulting engineer and endorsed by the Superintendent of the Water Department, with the agreed price for the same specified in the order, provided the price was not otherwise determined by the contract, and that all claims for extra work should be made to the city before the extra work is started. It is declared to be the intent of the contract that all work must be done and material furnished in accordance with the best practice, and in the event of any discrepancies between the plans and specifications, or otherwise, or in the event of any doubt as to the meaning of any portion of the contract, specifications or plans, the engineer shall define which is intended to apply to the work, and that any work or material not specified, but which might be fairly implied as included in the contract, of which the engineer should be the judge, shall be furnished by the contractor without extra charge. The estimated quantities of work and material are approximate and are to be used only as a basis for estimating the probable cost of the ~~xx~~ work and for comparing proposals. The actual work may differ therefrom and the basis for payment shall be the actual amount of such work done and material furnished, and if it cannot be otherwise agreed, the engineer shall in all cases determine the amounts and quantities of the several kinds of work which are to be paid for under the contract and all questions

on variations shall be at the risk of the contractor, and said director shall not be entitled to any claim for extra compensation for any variations in said stakes, or for any additional labor, material or appliances which he is obliged to furnish by reason of such variations or from any unforseen difficulty encountered in the prosecution of the work." [illegible]

The contract further provides that all loss or damage arising out of the nature of the work to be done or from the action of the elements or from any unforseen circumstances in the prosecution of the same, or from unusual obstructions or difficulties which may be encountered in the prosecution of the work shall be sustained and borne by the contractor at his own cost and expense. It further provides that no work should be regarded as extra work unless it was ordered in writing by the consulting engineer and endorsed by the superintendent of the Water Department, with the agreed price for the same specified in the order, provided the price was not otherwise determined by the contract, and that claims for extra work should be made to the city before the extra work is started. It is declared to be the intent of the contract that work must be done and material furnished in accordance with the specifications, and in the event of any discrepancies between the plans and specifications, or otherwise, or in the event of any doubt as to the meaning of any portion of the contract, specifications or plans, the engineer shall define which is intended to apply to the work, and any work or material not specified, but which might be fairly held as included in the contract, or which the engineer should judge, shall be furnished by the contractor without extra charge. The estimated quantities of work and material are approximate and are to be used only as a basis for estimating the probable cost of the work for comparing proposals. The actual work may differ therefrom and the price for payment shall be the actual amount of such work done and material furnished, and if it cannot be otherwise agreed, the engineer in all cases determine the amounts and quantities of the several kinds of work which are to be paid for under the contract and all questions

in relation to the work and construction, and decide all questions relative to the execution of the contract on the part of the contractor. His estimate and findings shall be conditions precedent to the right of the parties to arbitration or to any action on the contract, and to any rights of the contractor to receive any money under the contract.

The first well started was No. 3. After it was sunk about 53 feet, bedrock was not reached and appellant ordered the work stopped. He notified the city of this fact and the Superintendent of Water Works ~~xx~~ arranged a meeting at which appellant, the mayor, city engineer, Mead, resident engineer, Trestler, and the Superintendent of Water Works were present. At this meeting the matter was discussed; appellant refused to proceed further with the work unless he was assured of compensation for extra work that would be required on account of bedrock not being reached at a depth of from 25 to 50 feet. The mayor threatened to bring suit on appellant's bond unless the work went ahead. Appellant told the mayor he was privileged to do it. Then the city engineer, Mead, suggested that appellant go ahead and complete the work and submit a bill for extras, which he would look over and make a report as to what he regarded as an equitable adjustment. The suggestion was apparently agreed to by all parties, the meeting broke up amicably, and appellant proceeded with the work. In well No. 3, bedrock was reached at 93 feet and in well No. 2 at 88 feet. He filed a claim for the extra work and the engineer after examining it made a report recommending the payment of $4915.47 by the city for the extra work on the two wells. The city declined to pay the claim and appellant instituted this suit, filing a declaration containing a special count to which the general issue was filed. He later filed the common counts with copy of the account sued on together with an affidavit of claim. The plea of general issue was filed to the common counts. During the selection of jurors at the trial about five months later, appellant moved to strike this plea from the files and for judgment as by default on the ground that the plea was not accompanied by an affidavit of defense as required by Sec. 55 of the Practice Act. The motion was

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The first well started was No. 3. After it was sunk about 55 feet, [illegible] was not reached and appellant ordered the work stopped. He [illegible] the city of this fact and the Superintendent of Water Works [illegible] a meeting at which appellant, the mayor, city engineer, Mead, [illegible] engineer, Trestler, and the Superintendent of Water Works were [illegible]. At this meeting the matter was discussed; appellant refused [illegible] further with the work unless he was assured of compensation [illegible] work that would be required on account of bedrock not being [illegible] at a depth of from 25 to 30 feet. The mayor threatened to [illegible] on appellant's bond unless the work went ahead. Appellant [illegible] the mayor be was privileged to do it. Then the city engineer, [illegible], suggested that appellant go ahead and complete the work and [illegible] a bill for extras, which he would look over and make a report as [illegible] be regarded as an equitable adjustment. The suggestion was [illegible] agreed to by all parties, the meeting broke up amicably, [illegible] proceeded with the work. In well No. 3, bedrock was [illegible] at 28 feet and in well No. 2 at 28 feet. He filed a claim for [illegible] work and the engineer after examining it made a report [illegible] the payment of $4218.47 by the city for the extra work on [illegible] wells. The city declined to pay the claim and appellant in-[illegible] this suit, filing a declaration containing a special count to [illegible] the general issue was filed. He later filed the common counts with [illegible] of the account sued on together with an affidavit of claim. The [illegible] of general issue was filed to the common counts. [illegible] [illegible] of issues at the trial about five months later, appellant [illegible] to strike this plea from the files and for judgment as by default [illegible] that the plea was not accompanied by an affidavit of [illegible] as required by Sec. 22 of the practice act. The motion was [illegible]

denied and appellee was granted leave to file an affidavit of merits and the same was filed. The cause was tried before a jury and a verdict was returned in favor of appellee. Judgment was entered in bar and this appeal followed.

We think there was no abuse of the court's discretion in refusing to strike the plea and to enter judgment as by default. (Stafford v. Wills 220 Ill. App. 22.) The motion came too late; it should have been made earlier if appellant intended to rely on it. It is urged that the affidavit is insufficient in that it alleged conclusions, was equivocal and did not specify the nature of the defense to be relied on. The substance of it is, that if any such labor was done or material furnished, it was furnished at appellant's own suggestion and request under a contract for the digging of certain wells at an agreed price per foot, which agreed price appellee has paid in full, and that there were no extras contracted for by appellee. The defendant need not state the evidence but only the ultimate facts which will give notice of the nature of the defense. (Firestone Tire Co. v. Ginsburg 285 Ill. 132; Harrison v. Rose Hill Cemetery 291 id. 416.) We therefore think the affidavit is sufficient.

Appellant is of the opinion that the alleged extra work and material were outside the contract and not specified in it, and that he can recover their value as fixed by the evidence; but according to our view the work was not outside of the contract but was contemplated by it, and recovery, if any, must be had under it. The specifications did not definitely state the depth to which the contractor would be required to go to reach bedrock, although it is evidenct that the parties thought it would be reached at a depth of from 25 to 50 ft.; nevertheless, the contingency of greater depth was specifically provided for.

After the alleged extra work was finished, appellant submitted his bill for it and the engineer made a full report giving his findings and fixing the amount due appellant. Whether or not that action was the result of the agreement reached at the conference above mentioned is of little consequence because the express terms of the contract provide that the estimated quantities of work to be done and materials to be

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furnished are approximate ~~mm~~ only and that the basis for payment to the contractor shall be the actual amount of work done and material furnished. Where a contract requires the engineer to estimate the amount of work and to fix the price and further provides that his report as to those items shall be final, his decision is conclusive on all parties in the absence of fraud or mistake. (Barbee v. Findlay 221 Ill. 251: Trustees I. & M. Canal 5 Gil. 526; Korf v. Lull 70 Ill. 420.) Under the contract in this case either party might file written objections to the decision of the engineer and submit the question to arbitration. Appellee did not avail itself of this provision and is therefore concluded by the decision of the engineer, there being no evidence of fraud or mistake.

We do not think the clause in the contract providing that the contractor shall bear at his own expense, all loss or damages arising out of unforseen circumstances or some unusual obstructions encountered in the prosecution of the work applies or was meant to apply to the matters in dispute. On the contrary, it was foreseen that the depth to bedrock was uncertain and the contract so indicates. It specifically provides that no work shall be considered extra work unless ordered in writing by the consulting engineer and endorsed by the Superintendent of Water Works with the agreed price specified in the order, unless the price was otherwise determined by the contract, still, appellee insisted on the work in question being done and was aware of the understanding with the contractor that he would submit a bill for such work and that the engineer would look over the figures and report what he thought would be an equitable adjustment. Under the circumstances, the requirement that the order for extra work shall be in writing was waived. (Hart v. Carsley Manufacturing Co. 116 Ill. App. 159; Railroad Co. v. Moran 187 Ill. 324; Stubbings Co. v. World's Columbian Exposition Co. 110 Ill. App. 210; City of Elgin v. Joslyn 36 id. 301.) The language of the contract relating to the thickness or variations of strata applies to the drift above bedrock. It is evident that the word strata meant to apply only to the strata of which the

[illegible]hod are approximate mm only and that the basis for payment to [illegible] contractor shall be the actual amount of work done and material fur-[illegible]ed. Where a contract requires the engineer to ascertain the amount [illegible] and to fix the price and further provides that his report as [illegible]one items shall be final, his decision is conclusive on all parties [illegible] absence of fraud or mistake. (Barbee v. Findlay 221 Ill. 251; [illegible]tees I. & M. Canal 5 Gil. 526; Hoff v. Lull 70 Ill. 420.) Under [illegible] contract in this case either party might file written objections [illegible] the decision of the engineer and submit the question to arbitration. [illegible]alles did not avail itself of this provision and is therefore [illegible]ounded by the decision of the engineer, there being no evidence of [illegible]d or mistake.

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pproximate thickness is given in figures.

Appellant insists that it was error to refuse his second offered nstruction. With this we do not agree. It stated an abstract proposition of law and as drawn could afford the jury no assistance. Nor do we find any error in the modification of appellant's 10th instruction.

Appellee's 11th given instruction told the jury that plaintiff's Exhibit 4, while not binding on the city, must be considered by the jury together with all the other evidence in the case. Plaintiff's Exhibit 4 is the report made by the engineer as to the amount he found due the contractor on account of the extra work and material furnished. We have determined that under the contract this report was made by the engineer in the line of his duty as specified in the contract and that it is binding on appellee in the absence of fraud or mistake. It was prejudicial error to give the instruction. Appellant's 4th refused instruction correctly stated the law applicable to this question and should have been given.

Appellee's first given instruction refers to the contract as plaintiff's Exhibit 4, while the correct number of the exhibit is "1". In view of the fact that the engineer's report and recommendation was Exhibit 4 the instruction was misleading and should not have been given. It also assumed there had been an attempt made to change the contract. There is no evidence in the record to justify this assumption and for that reason also it was error to give it.

We think the judgment of the circuit court is not in harmony with the law and the facts of the case and it is accordingly reversed and remanded.

Reversed and remanded.

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anded.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 31st day of May in the year of our Lord one thousand nine hundred and twenty-seven

Justus L. Johnson
Clerk of the Appellate Court

Abstract 7690

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of April, in the year of our Lord one thousand nine hundred and twenty-seven, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

May 31, 1927

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Ernest J. Galbraith, Administrator de bonis non of the estate of Michael Harrigan, deceased,

Appellee,

v.

Maggie Harrigan,

Appellant

Appeal from the Circuit Court of Peoria County.

Jones J:

This is an appeal from the circuit court of Peoria County to review a judgment overruling objections filed by Maggie Harrigan to the partial and final reports of appellee, Ernest J. Galbraith, administrator de bonis non of the estate of Michael Harrigan, deceased, and approving said final report and for distribution. Appellee, as public administrator of Peoria County, was appointed administrator de bonis non of decedent's estate in October 1918 upon the removal of the executor for failure to inventory assets. The right of appellee to serve as such administrator de bonis non was contested through successive appeals to the circuit court and to this court, but his appointment was held to be regular and about the middle of the year 1920 he entered upon his duties. His first report and account was filed in the probate court on December 7, 1920 showing the receipt of certain funds in July of that year, out of which he paid the 1918 and 1919 taxes against the estate and applied $3505.83 on a claim of Peoria County for back personal taxes against the estate, leaving $500 in his hands which he retained for the payment of the 1920 taxes.

On May 23, 1912, the county filed a claim for back taxes for the years 1903 to 1911, both inclusive, against this estate in the sum of $5226.53; on the back of which claim there appears the following:- "4801.13 allowed by the Court as of the 7th class, this 25th day of Mch. A.D. 1913, A.M. Otman, Judge". No other entry of such allowance was made. On February 7, 1924, appellee filed his final report in the probate court showing the receipt of $3963.40 on a claim due the estate, and $500 as the balance on hand from the former report, making a total

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Appellee,

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of $4463.40. Out of this amount he took credit for items totalling $1232.67, leaving a balance of $3230.73. He asked that this balance be distributed pro rata upon certain unpaid claims including a balance of $3689.23 due on the said claim of Peoria County. Appellant and Christopher Harrigan, a brother of decedent, filed separate objections to the reports and on the hearing, the probate court sustained an objection of appellant to the omission of her claim for $459 and interest and dismissed all other objections. It found there was due to Peoria County $3689.23; to Maggie Harrigan $717.83 and to other claimants $148.26 and ordered distribution pro rata. Appellant appealed to the circuit court where an order was entered that appellee first pay the costs of administration including attorney fees; that he next pay appellant's said claim which with interest amounted to $760.85 and then pay the balance of the claims pro rata.

The contention of appellant that the memorandum made by the probate court on the back of the claim of Peoria County for back taxes did not amount to a judgment would have great weight were it not for the fact that appellant is not in a position to urge it. The so-called judgment of allowance of this claim has twice been before the Supreme Court (Harrigan v. People 305 Ill. 242; People v. Harrigan 294 id. 171.) In the last mentioned case it is stated that the order of the circuit court dismissing a certain appeal amounted to an affirmation of the order of the probate court allowing the claim of the county. Appellant is now estopped to deny the validity of the judgment of allowance and of the interest charge. If a judgment existed, it of course bore interest. Estoppels of record, to the extent that they bind parties, will also bind their privies. (21 C.J. 1067.) Appellant was privy to those proceedings.

Her contention that the probate court was without jurisdiction to allow the claim for personal taxes assessed against the deceased during his lifetime cannot be sustained. This phase of the case was also litigated in People v. Harrigan 294 Ill. 171 and in Harrigan v. People 305 Ill. 242. Whether the probate court had jurisdiction to

allow the claim for taxes and whether there was a judgment entered are questions that cannot be raised on this appeal. In our opinion, all matters pertaining to the judgment of the probate court on this claim have been determined by the Supreme Court and are res adjudicata.

It is claimed by appellant that no credit for the taxes paid for the years 1918 and 1919 should have been allowed; that there was no property in the administrator's hands belonging to the estate during that time; that such taxes were excessive and payment was never authorized by the probate court; and that it was appellee's duty to protect the estate against their payment. An administrator is regarded by statute in matters of taxation as the legal owner and possessor of his decedent's personal property after his appointment and until the property is distributed, and is therefore personally responsible for the taxes. (People v. Ballans, 294 Ill. 551; People v. Hibernian Bank Association, 245 id. 522.) He is entitled to be reimbursed for such taxes paid by him. (Sec. 271, Chap. 120 Revised Statutes.) Since the title to personalty and right of possession vests in the personal representative, taxes legally accruing thereon after the decedent's death and before distribution is made, are assessed to and should be paid by the executor or administrator, without presentation to or allowance by the probate court and when paid he will be entitled to credit therefor in his account as expense of administration. (Woerner on Administration 2nd Ed. star page 691.) The money which he finally received in 1924 and accounted for in his final report was derived from a promissory note belonging to his decedent and was a taxable asset of the estate, notwithstanding it had been the subject matter of litigation for a number of years. In view of the situation disclosed in Heinrich v. Harrigan, 288 Ill. 170 we cannot say that the taxes were excessive or that the court erred in allowing credit for their payment.

Appellant's having offered no evidence in the circuit court to sustain her objection to the allowance of attorney's fees precludes any consideration of the objection in this court.

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Appellant's brief offered no evidence in the circuit court to
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consideration of the objection in this court.

Interest is not chargeable against an administrator unless it has been received by him or unless funds have been held by him for more than two years and six months without good cause shown. Appellee filed his final report within three days after he received the bulk of all the money which came into his hands. The estate was involved in litigation for years and because of it he was not in a position during that time to make a final report. Under the facts in this case appellee is not chargeable with interest.

In his final report, appellee took credit for $77.28 as a payment made on a claim of Sucher, McNemar & Moore. The claim was settled or withdrawn subsequent to the filing of the report and on the hearing appellee admitted the fact, but through an oversight the item was not stricken from the report. There is no controversy about it and the mistake would have been rectified had it not been overlooked. The costs of this appeal should not be taxed against appellee on account of such oversight.

Appellee as state's attorney of Peoria County represented the county in People v. Harrigan 305 Ill. 242, and it is charged that he acted in a double capacity amounting to fraud. An examination of that case does not reveal anything justifying such charge.

All other errors assigned have not been argued and are therefore considered as waived. We are of the opinion that the order of the circuit court should be affirmed, except as to the Sucher, McNemar & Moore item, and that item is hereby excluded from the report and the order corrected so as not to include it; and the administrator is ordered to make distribution in accordance with the views herein expressed.

Judgment corrected and affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 31st day of May in the year of our Lord one thousand nine hundred and twenty-seven

Justus L. Johnson
Clerk of the Appellate Court

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Gen. No. 8012. Agenda 37

October Term, 1926

The People of the State of Illinois, Defendants in Error.

vs.

Lynn Beckham, Plaintiff in Error.

Error to the Circuit Court of Champaign County

CROW, P. J.

Defendant was convicted in the Circuit Court of Champaign County on an indictment of two counts charging him with selling intoxicating liquor in violation of the Illinois Prohibition Act. On trial by jury he was found guilty on both counts. After the motion for new trial he was sentenced to confinement in the county jail for ninety days on each count, the sentences to run consecutively. He was also fined $250 on each count and to pay the costs. It was further ordered by the court, that if, at the expiration of the jail sentence under the second count the fines and costs should not be paid, that defendant should work out the fines and costs at the rate of $1.50 per day in the county workhouse until said fines and costs are discharged. Defendant prosecutes a writ of error to reverse the judgment, assigning twenty-six errors.

The evidence as abstracted has been read carefully. If the jury believed the uncontradicted witnesses who testified for the prosecution there is no room to doubt that defendant was guilty in manner and form as charged in the indictment. No useful purpose would be subserved by reviewing it. Seven witnesses testified for the prosecution. None testified for the defense—not even the defendant. So far as objections were valid the court did not err with regard to them. Indeed it seems that defendant did not suffer and was not prejudiced by any of the court's rulings. They seem eminently fair.

It is objected that the court did not require a written bill of particulars. A motion was made asking for one. The court said he had not been ruling the state's attorney to furnish such a bill, but directed him to furnish to defendant "the data that is, who the sale was made to, and when, put it in the record here or hand it to counsel. Can you do that by 9 o'clock Monday morning?" Mr. Hodson: "I think so." The court: "All right; that answers the purpose." One of counsel for defendant objected to going to trial when the case was called on May 20 and made oral statement under oath as to the bill in particulars. He said he had not received it in writing. He was verbally informed by the state's attorney of all he could require. It was within the discretion of the court in this case to grant a bill of particulars. If one was required to be furnished in a proper case, it should perhaps be in writing. But defendant got all the information he was entitled to and the assignment of error is without merit.

It is objected that the **corpus delicti** was not proved beyond a reasonable doubt. The jury heard the evidence, saw the witnesses, and by their verdict, under the instructions of the court, indicated in unmistakable fashion they believed beyond a reasonable doubt that defendant sold intoxicating liquor as charged. The evidence of guilt is so convincing that it is believed no one could entertain any doubt as to his guilt. But it is urged against the verdict that the prosecution did not establish that the stuff sold was intoxicating liquor; that intoxicating liquor has a legal definition; that the word "beverage" is used in its ordinary sense, meaning liquid for drinking. All of that is true. But a legal definition of intoxicating liquor is fixed by statute. Anyone selling any liquid for beverage, that is for drinking purposes, with an alcoholic content in excess of that provided by the General Assembly is guilty of selling intoxicating liquor. It is further urged that whether a liquid is fit

for beverage purposes depends upon whether or not it is agreeable to taste and is free from poison or other deleterious substances making it unsafe to take into the human stomach, as a drink.

That contention proves too much and is therefore fallacious. It involves a double standard. A respectable portion of the community believes that the best "liquor" that ever came from a still or brew house must be excluded under counsel's definition of fitness. Another class makes no inquiry as to content of poison and inquires only where it can be obtained. But with the statutory definition applied if it would intoxicate, it is of course intoxicating in fact. If it possesses an excess of the alcoholic content, to sell it is a violation of the statute. The first description may be testified to by anyone who has drunk intoxicating liquor: the second class may be established only by chemical analysis. From the evidence in this case as to the manner in which defendant went about his business, the night time, in out-of-the-way places, the young man who bought it, regardless of everything else there is and can be no doubt in the mind of a reasonable person that it was intoxicating and that it was bought and sold for that purpose. As long as the law is unrepealed the courts have no authority to whittle it away by construction.

Error is assigned that the state's attorney made improper and prejudicial and inflammatory remarks calculated to arouse the passion and prejudice of the jury against the defendant. While the argument for the prosecution is set out in the abstract, that for defendant is not. Counsel did not observe strictly the rules governing the arguments of causes before courts and juries. The only purpose of argument is to lay before the jury the evidence so as to show that it establishes the conclusion contended for. In

that connection the law applicable may be and is proper to be stated. Vituperation is not argument and is always out of place in the trial of any sort of case. If the evidence in this case left any doubt of guilt in the mind of the reviewing court, the remarks excepted to might result in reversal. But under the evidence no such result could be applied without being hypercritical. In view of the conclusive character of the case against defendant, if he is hurt it is the result of his violation of the statute and for no beneficient ulterior purpose.

It is said the Prohibition Act provides punishment for its violation and that the sentence to work at $1.50 per day until the fine and costs are discharged is unauthorized. The punishment for violation of the act may be by fine and imprisonment. The Criminal Code provides: "That any person convicted of petty larceny or any misdemeanor punishable under the laws of this state, in whole or in part by fine may be required by the order of the court of record in which the conviction is had, to work out such fine and all costs, in the workhouse of the city, town, or country, or in the streets and alleys of any city or town, or on the public roads in the county, under the proper person in charge of such workhouse, streets, alleys or public roads at the rate of one dollar and fifty one-hundredths dollars per day for each day's work." Cahill, Chap .38 Sec. 384.

This section is all the comment that is necessary in reply to defendant's contention. It has been applied many times and the court did not err in applying it here. The instructions have been examined in the light of the criticism leveled against them and they afford no ground for reversal. Finding no reversable error in the record the judgment of the Circuit Court is affirmed.

Affirmed.

Gen. No. 8032 Agenda 18

Ira D. Kelsheimer, Appellant

vs.

Dessa Kelsheimer, Appellee

Appeal from Champaign

NIEHAUS, J.

In this case the appellant Ira D. Kelsheimer filed a bill for divorce in the Circuit Court of Champaign County, charging the appellee with willful desertion for a period of more than two years prior to the filing of the bill of complaint.

The appellee filed an answer denying the charge; and thereupon the case proceeded to trial.

At the close of all the evidence adduced by the appellant, to prove the charge made, the court directed the jury to return a verdict finding the appellee not guilty; and the jury returned a verdict accordingly; whereupon the court dismissed the bill of complaint for want of equity. This appeal is prosecuted from the order of the court dismissing the bill; and error is assigned on the action of the court in directing the verdict.

The evidence in the record however clearly justified the court in directing the verdict. It appears from the evidence that while the parties lived separate and apart nearly all the time, and for more than two

years prior to the filing of the bill, the separations of the parties, one from the other, was either mutually acquiesced in by them, or was the result of quarrels or disagreements concerning their marital relations and their respective conjugal rights and obligations; but the evidence does not show that the appellee willfully deserted the appellant as charged in the bill of complaint.

We are of opinion therefore, that the court properly directed a verdict of not guilty, and the order dismissing the bill is affirmed.

Affirmed.

General No. 8048 Agenda 27

Maude A. Lindsey, Appellee.

vs.

John H. Lindsey, Appellant,

Appeal from City Court Canton, Fulton County.

NIEHAUS, J.

In this case an appeal is prosecuted by the appellant, John H. Lindsey, from an order of the city court of Canton, in a separate maintenance proceeding to procure support for the appellant's wife, Maude A. Lindsey, pendente lite. The court's order requires the appellant to pay $12.50 per week; also requires the appellant to pay $50.00 solicitor's fees and $25.00 for suit money.

It is contended on appeal that the allowance of $12.50 per week for the temporary support of appellee is contrary to the facts and not warranted by the law, and because the support of the minor child is included in the order; also, that there is no warrant in the law of this kind of proceeding for the allowances made.

The bill of complaint field by the appellee charges that her husband the appellant, has been guilty of adultery; and that he has wilfully deserted and abandoned her; and that she is living separate and apart from her husband without her fault; and that she is without means of support for herself and the minor child of the parties; and without money to prosecute her suit.

It is clear, from the averments of the bill that the appellee is in need of money and means for her maintenance and support during the pendency of her suit, and for solicitor's fees and suit money to enable her to properly prosecute her suit. The statute provides in Sec. 1 of the Act concerning separate maintenance, that an allowance may be made to enable a wife to prosecute her suit, as in suits for divorce. Chap. 68, Sec. 22 Cahill's Revised Statutes, Sec. 15 of the Divorce Act provides, that:

"In all cases of divorce, the court may require the husband to pay to the wife or pay into court for her use during the pendency of the suit such sum or sums of money as may enable her to maintain or defend the suit; and in every suit for a divorce the wife, when it is just and equitable, will be entitled to alimony during the pendency of the suit." It is true that the appellant denies the allegations of the bill of the complaint; but the merits of the appellee's cause of action are not a subject of inquiry and cannot be determined on a motion or petition for temporary alimony, solicitor's fees, or suit money, to enable her to prosecute her suit. **Harding v. Harding** 144 Ill. 588; **Cooper v. Cooper** 185 Ill. 163; **Reisschneider v. Reisschneider** 241 Ill. 92; **Nelson v Nelson** 219 Ill. App. 571. The appellant contends, that it was error to include the minor child of the parties in the provision for support of the wife. Technically there may be some ground for the appellant's contention; under the statute, however, if the husband abandons his wife, as alleged in the bill of complaint, the wife is entitled to the custody of the minor children unless a court of competent jurisdiction, upon application for that purpose, shall otherwise direct. Chap. 68, Sec. 16, Cahill's Revised Statutes; but it muts also be pointed out, that in this case the child was left by the appellant in the custody of his wife, who was thereby put in position where she had to look after the support of the child for which the appellant was legally liable; and that under these circumstances the support of the child could only be effectuated through the mother; and by an allowance to the mother; and it clearly appears also that the appellant recognized this fact by having made some payments to the mother for that purpose. The support of the child in this situation is necessarily bound up with, and has become a part of the provision to be made for the support of the mother during the pendency of the suit; **Low vs. Low,** 133 Ill. App. 613. We are therefore of the opinion that the court did not err in that feature of the case. Moreover the amount allowed for support and maintenance is not more than should have been allowed for the support and maintenance of the appellee alone, taking into consideration the earnings and admitted net income of the appellant, as disclosed by the record.

We find no reversible error in the order, and for the reasons stated, the order is affirmed.

Affirmed.

Gen. No. 8026 Agenda No. 14

October Term, 1926

W. J. Lateer, Appellee,

vs.

Jennie C. Neil, et al, Appellants.

Appeal from the Circuit Court of Shelby County.

SHURTLEFF, J.

This is an appeal from the order of the Circuit Court of Shelby County, denying appellants' motion to open a judgment entered in vacation in said court upon June 1, 1926, in favor of appellee and against appellants and asking leave to plead and to stay execution. It appears from the transcript of the record presented to this court that after the entry of said judgment on August 2, 1926, appellants presented their said motion and submitted certain affidavits in support thereof, and that on August 13th the court entered a final order denying said motion, granting an appeal, and entered an order that a bill of exceptions be presented within forty-five days, but no bill of exceptions was ever presented or approved, and none appears in the record. There is, therefore, nothing before this court other than the common law record. However meritorious appellants' defense may be to the note in question, presented by the affidavits accompanying said motion, the affidavits are not before the court on this appeal and can only be made a part of the record by a bill of exceptions.

In **Peter Hand Brewing Co. v. Nauseda et al,** 210 Ill. App. 154, it was held: "The abstract, which is the pleading of the defendants, contains the affidavits read upon the hearing of the motion to open the judgment. These have no place in the statutory record,

but belong in the bill of exceptions. As the latter document has been stricken we are not privileged to examine or review these affidavits and consequently are not at liberty to decide their probative force, but must assume that the ruling of the trial judge on the motion was correct and not in the condition of the record subject to challenge. **Horn v. Neu,** 63 Ill. 539; **Alward v. Harper,** 253 Ill. 294; **People v. Board of Review of Cook County,** 263 Ill. 326.

"In the condition of the record before us the jugment must be affirmed. **Schwartz v. Brinks Chicago City Exp. Co.,** 198 Ill. App. 381."

To the same effect is **C. R. I. & P. Ry. Co. v. Town of Calumet** 151 Ill. 515.

Finding no error in the statutory or common law record, the judgment of the Circuit Court of Shelby County is affirmed.

Affirmed.

Gen. No. 8056 Agenda No. 32

October Term, A. D. 1926

Columbia Weighing Machine Company, Appellant,

v.

Alvin Henkel and Enno Henkel, Partners, etc., Appellees.

Appeal from the Circuit Court of Montgomery County

SHURTLEFF, J.

Appellant brought its suit in assumpsit in the Montgomery County Circuit Court against appellees, to recover the contract price of one Columbia mirror weighing machine. The declaration contained a special count and the common counts. The special count alleged that appellees, partners, made and delivered to appellant the instrument sued upon, as follows:

> "You may ship us one Columbia Mirror Weighing Machine. It is sold to us with the understanding that we may return to you at any time within thirty days from the date of arrival of the machine, instead of paying the purchase price. Return shipment to be made to above address, by freight. Should we not ship it back to you within thirty days from the date of its arrival, we will pay you the purchase price of one hundred and fifty dollars, fifteen dollars per month until paid, first payment to be made within forty days from date of the arrival of the machine. Should we be two monthly payments in arrears at any time the entire unpaid balance of the purchase price shall become due, with attorneys fees amounting to 20 per cent of the sum in default."

There was a plea of the general issue and defendants gave notice in writing that they would give in evidence on the trial that they did, within thirty days from the date of the arrival of the machine, deliver the machine to the plaintiff, and that they would further give in evidence a breach of warranty, partial failure of consideration, that the said article did not comply with the warranty and that said machine was defective, of poor material and would not weigh properly, and was not fitted to do the work for which it was intended.

There was a trial by jury and verdict and judgment for the defendants, appellees in this court, and appellant has brought the record to this court for review.

Upon the trial, appellees, without objection, offered proofs tending to show that on December 20, 1924, and within thirty days after the receipt of said machine, appellees instructed their drayman to take the machine and reship it to appellant, and that the machine was taken from appellees' place of business on December 23 or 24, 1924, and billed by the drayman to appellant at New York, at the railway station on January 5, 1925, and that said machine was reshipped, the delay being accounted for by the testimony, tending to show that on December 20 or 21, 1924, there was a violent sleet, wind and snow storm in that immediate vicinity and generally in that section, which blew down trees, limbs, poles and resulting that, for a considerable time thereafter, traffic upon the railroad and upon the streets of Nokomis, where appellees were located in business, was effectually blocked, and the storm is described in some of the testimony as being unusualy severe and practically unheard of in that section. It was shown by some testimony, uncontradicted, that the machine was shipped as soon as it reasonably could be shipped after the storm. Appellant objected to none of this testimony but, in a spirited manner,

cross-examined the witnesses in an effort to minimize the effect of the storm. Appellant and appellees tried the case and offered instructions, which were given to the jury, upon the theory that the issue was whether the reshipment of the machine was delayed by the act of God. The court instructed the jury on the part of the plaintiff, appellant:

"If the jury believe from the evidence that the written agreement between the parties was that the defendants were not to keep the weighing machine in question, unless it suited them, and that they had the privilege of returning to the plaintiff if they did not want it, within thirty days from the date that they received it, that then the defendants were bound to return the machine within the thirty days, as provided in said agreement, **unless prevented by the act of God,** or **public safety** or **unavoidable accident**, and if they did not do so the defendants will be held to have elected to keep the machine and pay for it at the agreed price."

Appellees' instructions were of a similar purport. No objection was made to any of this testimony until the close of all the testimony when appellant moved to exclude all of the testimony concerning the inability to return the machine on account of the inclemency of the weather on the ground it was not set up by special plea. This the court denied. Appellant now contends that he was taken by surprise at the introduction of this testimony and that the inability to return the machine by reason of the act of God does not come within the purview of the pleadings in the case and, therefore, appellant asks for a new trial.

In **Wheeler v. C. & W. I. R. R. Co.**, 267 Ill. 325, the court held: "Where both parties to a suit submit instructions declaring the rules of law applicable to the facts proven and request the jury to return their verdict in accordance with those rules of law as applied to the facts proven, neither party can be heard to complain that such facts were not within the scope of the allega-

tions of the pleadings under which those facts were permitted to be proven. (**Illinois Steel Co. v. Novak**, 184 Ill. 501; **Illinois Central Railroad Co. v. Latimer**, 128 id. 163; **Chicago & Alton Railroad Co. v. Harrington**, 193 id. 9; **Donk Bros. Coal Co. v. Stroetter**, 229 id. 134.)"

A new trial cannot be granted upon the ground stated.

Appellant, in a motion for a new trial in the court below, presented an affidavit made by counsel for appellant, presenting certain facts as to the weather in December, 1924, as newly discovered evidence, which, as stated in the affidavit, an observer of the weather conditions would swear to upon another trial as a witness. We have read the affidavit and it states merely cumulative proof and conclusions. "There were no unusual conditions of weather in said county which were superhuman or in opposition to the act of man," is not the statement of a fact but a mere conclusion; but the affidavit does state that there was a sleet storm on December 19, 1924. Appellant cannot claim to have been taken by surprise on the trial when he made no objection to the testimony and joined in the issue upon which the case was tried.

No other errors are pointed out that would warrant a reversal of the judgment and it is, therefore, affirmed.

Affirmed.

General No. 8027 Agenda No. 15

October Term, A. D. 1926

Bloomington Auto Sales Company, et al, Appellees

vs.

Indemnity Company of America, a Corporation, Appellant

Appeal from McLean

NIEHAUS, J.

In this case the appellees, Walter Ritchie and J. E. Wyckoff, co-partners under the name of the Bloomington Auto Sales Company, filed a bill in equity to reform an insurance policy, known as a garage policy, which it is averred was issued to them as owners of a garage, to insure them, and each of them, against liability incurred by the driving of any car by them or by their workmen and employes, in connection with their garage business; or in consequence of the driving of any automobile owned by either one as an individual, when driven either by himself, or by any member of the family.

It is averred, that the policy inadvertently and by mutual mistake contains the word "corporation" instead of "co-partnership" in connection with the name Bloomington Auto Sales Company; and that the name of one of the partners, who was to be insured, namely, J. E. Wyckoff, is not contained in the policy; but was inadvertently omitted; also, that the so called family rider, which was to be attached to the policy for the purpose of insuring the individual members of the firm and members of their families against liability, was inadvertently omitted and not attached to the policy, by mistake. The bill prays, that the policy of insurance in question be corrected, so that the Bloomington Auto Sales Company insured thereby, be described as a co-partnership instead of a corporation; and that the correct name of one of the co-partners, J. E. Wyckoff, be inserted therein; and that the "family rider" be attached to the policy. The

appellant filed an answer to the bill, denying the material averments of the bill, and the right of the appellees to have the policy corrected and reformed. When the cause was at issue, it was referred to the Master to take the proofs and report the same together with his conclusions, which was done. The Master found that the appellees were entitled to the relief prayed for, and the appellant filed objections to the Master's report, which were afterwards ordered to stand as exceptions. Upon the hearing of the exceptions, by the chancellor, they were overruled, and a decree entered granting the relief prayed for. This appeal is prosecuted from the decree.

It is contended by the appellant as grounds for reversal of the decree, that 'the evidence does not disclose a mutual mistake; that the mistake alleged by the complainant if it existed has been waived; that the terms of the policy as written have been accepted and ratified by the complainant; that the complainants are estopped from asking the relief prayed for; and that the complainants are barred from the relief prayed for by negligence.'

The facts upon which the decree is based are found in the decree, namely:

"That the complainants, J. E. Wyckoff and Walter Ritchie were, during the entire year of 1921, partners doing business under a co-partnership name or trade name of Bloomington Auto Sales Co. That said business known as the Bloomington Auto Sales Co. was established in 1919 as a co-partnership, the members thereof being Walter Ritchie and Guy Wyckoff, and that the complainant J. E. Wyckoff became a member of said co-partnership January 1, 1920, and that from January 1, 1921, said partnership consisted of Walter Ritchie and J. E. Wyckoff. That said partnership was engaged in the automobile and garage business in the City of Bloomington at 405 West Washington street during all said time from its inception.

The Court doth further find that Freese & Company, Inc., was the agent of the defendant, located in the City of Bloomington, Illinois, with full authority from said defendant to sell its insurance, to solicit business for said defendant, to collect premiums, to investigate losses and liabilities and such general powers as insurance agents usually and customarily have. That said Freese & Company, Inc., did not at any time act as agents and were not authorized to act as agents for the complainants or any of said complainants. That the predecessors of Freese & Company, Inc., who likewise represented said defendant were the Freese Insuranc Agency, and Freese, Clark & Company.

That most of the personnel and officers of said agency were the same from 1919 until the date of the filing of the bill.

That April 19, 1919, the defendant, through its duly authorized agent, Freese, Clark & Company, issued a policy of insurance for said business of Bloomington Auto Sales Co. and named the insured in said policy as Guy Wyckoff and Walter Ritchie doing business as Bloomington Auto Sales Co. That said policy on insurance then issued indemnified the insured against all liability for injuries received, all persons in the service or employ of the assured, engaged in or connected with the operations of said business, to whom compensation of any nature is paid or allowed, including loaders, material handlers, timekeepers, salesmen, demonstrators, mechanics, washers, chauffeurs, office force and all others, and to cover accidents resulting from the use of any automobile by the assured, if an individual, by a partner, if a co-partnership, by an executive officer, if the assured is a corporation, and also said policy had attached to it a rider known as a "family rider" whereby it was agreed by the insurance company that the policy extended to cover the private and personal interests of the said copartners due to the operation of any car owned or driven by them and their immediate families. That the premium for said insurance was based upon the payroll of said business and included the sum of $1,500.00 for each partner of said business and $1,500.00 for each salesman, and that the premium was based upon the estimated payroll at or about the time of the issuance of said policy, and which estimate was at the end of the year verified and the correct amount of the payroll taken as the basis for the charge of the premium, the rate being $2.10 for every $100.00 of said payroll.

That on April 19, 1920, being the date of the termination of the first policy, a new policy was issued by said defendant, said new policy being practically a duplicate of the prior policy, changing the date of the issuance and the expiration, but in its essential parts like the first policy. That at the time of the issuance of said second policy, an estimate of the payroll was again made and the premium rate charged being $1.50 per $100.00 for personal injury or liability and $.60 for property damage liability, or a total of $2.10 and that the total amount of premium upon said estimated payroll was $105.00. That on May 5, 1921, an audit was made by the local agency of said payroll and on said audit of the payroll an addition of $40.96 was made to the premium, making the total premium at said time $145.96. That on June 1, 1921, another audit was made of said payroll and at the said time there was added $115.50, making the total premium on said payroll as audited $261.46.

That upon the 19th day of March, 1921, Freese & Company, Inc., the authorized agents of said defendant, for the purpose of again issuing insurance covering the liability of the said business and the partners thereof, prepared a Schedule of Statements, the policy to be issued under said statement to be for twelve calendar months beginning at noon on the 19th day of April, 1921, and ending at noon on the 19th day of April, 1922. That said statement was signed. "Freese & Company, Inc., authorized agents, Bloomington, Illinois." That the said agents of the defendant in preparing said statement described the assured,—"Bloomington Auto Sales Co."; the address of the assured as "405 W. Washington street, Bloomington, Ill.," and in answering inquiry three of said Statement as to whether the insured is an individual, corporation, partnership, trustee, assignee or receiver, stated that it was a corporation. That said statement also included the estimated pay-

roll and included therein in said estimate $1,500.00 for two officers or proprietors, $1,500.00 for one salesman, $900 for office and clerical help and $5,000.00 for all other employes, and fixed the rate of premium at $1.50 for personal injury and $.60 for property damage, said total of $2.10 being payable as premium for every $100.00 of payroll, and that the total premium as estimated at $218.40. And that said premium on estimated payroll was paid by said J. E. Wyckoff and Walter Ritchie, doing business under the trade name of Bloomington Auto Sales Co. That inquiry No. 10 of said Statement, and answer to said inquiry therein contained were as follows: "No accident has been caused by an automobile owned or driven by the assured and no claim has ever been made against assured as result of such an accident, except" —"None except known to company." That there had been some small claims adjusted by the defendant company for said co-partnership prior thereto. Said statement further provided that the policy was written on the basis of an annual adjustment of the actual compensation for such period as provided for by the policy. That said statement was not signed by any of the complainants and the facts therein stated were unknown to the complainants.

The Court doth further find that immediately prior to the date of said last mentioned Schedule of Statements, Ralph Freese as representative of Freese & Company, Inc., called upon the complainant J. E. Wyckoff in order to procure from him an estimated payroll of said business for the ensuing year, so as to incorporate the same in said statement and for the purpose of the issuance of the new policy. That said J. E. Wyckoff then gave to him an estimate of said payroll and told him that there were two partners and that $1,500.00 was to represent the services of the said J. E. Wyckoff, $1,500.00 to represent the services of Walter Ritchie, $1,500.00 for one salesman, and the balance of the payroll was estimated upon the payroll check book. And that said J. R. Wyckoff made inquiry of Mr. Dobbins (of Freese & Co.) as to whether the said policy would cover and insure him against all liability for the operation of the automobile personally owned by him and that said Dobbins then and there told him that it would cover all liability of both J. E. Wyckoff and Walter Ritchie while operating their own automobile or while the same was being operated by any member of their respective families, and that said representation was relied upon by said J. E. Wyckoff.

The Court doth further find that in the making out of the Schedule of the Statements by said Freese & Company, Incorporated, through the inadvertence of the scribner, one of the members of said Freese & Company, Inc., the assured was described as a corporation when, in fact, it should have been described as a co-partnership, and that the policy of insurance issued by the defendant in compliance with said statement described the assured as Bloomington Auto Sales Co., and further described the assured as a corporation.

The Court doth further find that there was no corporation engaged in the automobile or garage business in the City of Bloomington at the same time by the name of Bloomington Auto Sales Co., and that the only Bloomington Auto Sales Co. operating any business in the city of Bloomington was the co-partnership business of J. E. Wyckoff and Walter Ritchie doing business under the trade name of Bloomington Auto Sales Co. That the pay roll upon which the premium was estimated was the payroll of the co-partnership of Walter Ritchie and J. E. Wyckoff doing business as the Bloomington Auto Sales Co., and that the premium was paid by said co-partnership, and that the corporation known as

the Bloomington Auto Sales Co. had no employes, no property and no business of any kind or character at the time of the issuance of said policy.

The Court doth further find that in the early part of 1920, the parties interested in said co-partnership applied for a charter for a corporation under the name of Bloomington Auto Sales Co., and that the charter was then issued, but that nothing further was done in reference to turning over said business to said corporation, no officers were elected of said corporation, and that while it was the intention at some future date to turn the business over to said corporation, said plan was not followed at said time. That said corporation was not functioning and did no business, had no property, no employes, no payroll, until January 1, 1922. That on January 1, 1922, said co-partnership finally carried out their plan and transferred the assets of said co-partnership and the business over to the said corporation. And that from the time of the issuance of the said charter, the early part of 1920, until January 1, 1922, said corporation was dormant and had no interest of any kind whatsoever in the business of said co-partnership, which was then conducted under the trade name of Bloomington Auto Sales Co.

The Court finds that the policy of insurance countersigned at Bloomington, Illinois, the 19th day of April, 1921, issued by the defendant, being Policy No. G-6070, and known as complainants' "Exhibit B" in this cause was through inadvertence, accident and mutual mistake issued to Bloomington Auto Sales Co., when in fact the name of the assured should have been and was intended to be J. E. Wyckoff and Walter Ritchie, doing business under the trade name of Bloomington Auto Sales Co. And that the description of the assured in said policy, paragraph three, under the title "Schedule of Statements" wherein it is stated that the assured is a corporation was by inadvertence, accident and mutual mistake described as a corporation in place of a co-partnership.

The Court doth also find that through inadvertence, accident and mutual mistake the family rider was not affixed or attached to said policy, though the premium collected therefor included the risk of indemnifying or insuring the said J. E. Wyckoff and Walter Ritchie against all liability arising out of any personal injury or property loss caused to any other person by reason of the operation of automobiles owned by either of said co-partners, while driven by either of said co-partners or by members of their families.

The Court doth further find that the said policy issued by the said defendant is known as a garage policy and that during said entire period said Freese & Company, Inc., as agents for said defendant, issued like policies to other owners of garages in the City of Bloomington and that said indemnity against liability of the members of the co-partnership as contained in the family rider, was attached to the policies issued by them during the said period to all other garage owners which they insured and for which a like premium was collected as was collected from the co-partnership of the complainants, and that it was the intent and purpose of Freese & Company, Inc., as authorized agents of said defendant, to attach such rider upon the policy above described.

The Court doth further find that the errors, discrepancies and omissions aforesaid were not discovered by the complainants or any of them until sometime after December 17, 1921."

The findings of fact in the decree are sustained by the proofs in the cause, which clearly show that the name of J. E. Wyckoff as a partner was inadvertently omitted, and that

the failure to attach the family rider was also the result of inadvertence and mutual mistakes as well as the substitution of the word corporation for co-partnership in the policy in connection with the firm name. It is well settled that where parties to a contract of insurance through inadvertence make a mistake in the name of the insured, or in the description of the property insured, or where the policies of insurance do not insure the persons or interests intended to be insured, a court of equity may be resorted to, to correct the mistake. **German Fire Insurance Co. v. Gueck** 130 Ill. 345; **Home Ins & Banking Co. v. Myer** 93 Ill. 271; **Robinson v. Union Automobile** 198 NW 166; **Keith v. Globe Ins. Co.** 52 Ill. 518; **Cook v Winchester Fire Arms Co.** 82 NW 315; **Mercantile Ins Co. v. Jaynes** 87 Ill. 199; **Continental Ins. Co. v. Ruckman** 127 Ill. **364**; **Snell v. Atlantic Fire Ins. Co.** 98 US 85. And it is no bar to a reformation of a policy that the suit is maintained after a loss has occurred which would fall within the terms of the policy as reformed. **German Fire Insurance Co. v. Gueck** supra; **Mercantile Ins. Co. v. Jaynes**; supra; **Snell v. Atlantic Fire Ins. Co.** supra; **Equitable Safety Ins. Co. v. Hearne** 22 US (L. Ed.) 398;**Graves v. Boston Marine Ins. Co.** 2 US (L.Ed.) 324; 14 R. C. L. 203.

The record does not disclose any evidence of waiver by the appellees of their equitable right to a correction of the policy; nor is there any evidence which might invoke the principle of estoppel.

For the reasons stated, the decree is affirmed.

Affirmed.

General No. 8034 Agenda No. 39

October Term, A. D. 1926

Bessie Ervin and Tymore Feeback, Plaintiffs in Error

vs.

People of the State of Illinois, Defendants in Error.

Error to County Court Vermilion County.

NIEHAUS, J.

In this case, an information was filed in the county court of Vermilion county under Section 11 of the Criminal Code, charging the plaintiffs in error, Bessie Ervin and Tymore Feeback, with unlawfully living together in an open state of adultery. A plea of not guilty was entered to the information, and thereupon a trial was had which resulted in a verdict finding the plaintiffs in error guilty, and they were ordered to pay a fine of $100.00 each and costs of suit. A writ of error is prosecuted from the judgment of conviction.

The principal errors assigned are in reference to instructions given for the People. One of these instructions is as follows: "The court instructs the jury as a matter of law that guilt may be shown either by direct evidence, or by circumstances from which, according to the usual laws of reason and common experience, guilt is clearly inferable. When these circumstances are shown the presumption of guilt displaces the presumption of innocence." This instruction is erroneous. While it is true that guilt may be shown by circumstances appearing in evidence which satisfy the jury of the defendant's guilt beyond a reasonable doubt, the guilt must be inferable from the circumstances in evidence and not from any usual laws of reason, or from common experience; furthermore the presumption of innocence is not displaced by such circumstances, and the presumption of guilt does not displace the presumption of innocence when such circumstances are shown; but a defendant is entitled to the benefit of the presumption of innocence all through the trial,

until the presumption of innocence is displaced by evidence of guilt which satisfies the jury beyond a reasonable doubt that the defendant is guilty of the offense charged. **People v. Foster** 288 Ill. 371. The seventh instruction given for the People is as follows: "The court instructs the jury that the offense of adultery is sufficiently proved by circumstances which raise the presumption of cohabitation and unlawful intimacy." While this instruction is in the language of the statute, it is nevertheless misleading in that the jury could readily infer from the instruction that the offense with which the plaintiffs in error were charged was the commission of an act of adultery; and that the proof which the statute intended should be regarded as sufficient to prove an act of adultery would be sufficient proof also of guilt of the plaintiffs in error of the defense charged, which was a living together in an open state of adultery; the proof of adultery is only one of the essential elements of proof to sutsain a conviction. In the case of **Miner v. The People**, 58 Ill. 58, the point under consideration was passed upon by the Supreme Court; and the court there said: "The crime of adultery can not be sustained by proof of the familiarities shown on the trial, or a single act of illicit intercourse, or a number of acts. The language of the statute is, 'an open state of adultery.' The living together must be open and notorious, as if the relation of husband and wife existed. The illicit intercourse must be habitual." The commission of adultery alone, however immoral, is not sufficient to sustain a conviction for the offense as defined by our statute; it is the open living together by the parties, in a state of adultery, which constitutes the offense. **People v. Moreland** 186 Ill. App. 562.

For the errors indicated, the judgment of conviction is reversed and the cause remanded.

Reversed and remanded.

General No. 8043. Agenda No. 24

October Term, A. D. 1926

Frank E. Yeazel, Appellant.

vs.

Frank Bowman, Appellee.

Appeal from Vermillion

Niehaus, J.

In this case the appellee Frank Bowman, obtained a judgment by confession in the Vermillion County circuit court against the appellant Frank E. Yeazel and others, on a $2000.00 judgment note which he held as collateral security for the payment of indebtedness due him from the Alvin Grain and Electric Company. The judgment rendered was thereafter opened, and appellant was given leave to plead his alleged defense thereto. He filed the general issue and a special plea, setting up his defense; but the court sustained a demurrer to the special plea filed; thereupon appellant by leave of court withdrew the general issue and filed an amended special plea. The court sustained a demurrer to the amended plea; and the appellant elected to stand by his amended special plea; whereupon the court ordered the judgment to stand as originally entered. An appeal is now prosecuted from the judgment; and error is assigned on sustaining the demurrer to appellant's amended special plea.

It appears from the averments in the special plea, that the Alvin Grain & Electric Company, of which the appellant was the president and principal stock holder, and which was in the grain and electric lighting business at Alvin, Illinois, had become financially embarrassed because of a large amount of outstanding indebtedness; some of which indebtedness was in the form of judgment notes of the company, which had been signed by William A. Yeazel and Ellen Yeazel, the father and mother of appellant, as sureties; also other notes signed by other parties

as sureties or accommodation makers for the Alvin Grain & Electric Company; also an indebtedness to the Farmers National Bank of Rossville, Illinois, which was sescured by chattel mortgage on the grain elevator of the company and machinery and equipment connected therewith. The company also owed a number of debts which were unsecured. On April 16, 1921, the company in order to satisfy the different secured creditors, and to delay any attempt on the part of creditors to seek immediate satisfaction of their claims, and so as to enable it to continue business, made an adjustment of its financial affairs for that purpose and a contract was entered into in writing, which took into account the liens and securities held by the different creditors; the property of the company and of the appellant; and the property of Willaim A. and Ellen Yeazel, who were liable as accommodation makers and sureities on notes representing the largest part of the indebtedness of the company. This contract was entered into on April 16, 1921, by the Alvinn Grain & Electric Company, the appellant and William A. and Ellen Yeazel as parties of the first part; certain creditors therein named, including the appellee, were parties of the second part; and the Commercial Trust & Savings Bank of Danville, Illinois, as trustee, was party of the third part. The contract referred to, sets out certain items of indebtedness of the company, and the different persons or corporations holding such indebtedness; and the securities if any which they held respectively. Contract refers to the indebtedness held by the appellee, as follows:

(e) Frank Bowman 2,000.00
Signed by said Company
and Frank Yeazel

Frank Bowman 2,000.00
Signed by said Company,
Frank Yeazel, William
A. and Ellen Yeazel.

The last note bearing a
credit of $1,500.00.

This contract recites, that the first parties were indebted to the second parties in divers amounts; and that all of

obligations were the debts of said company, and the said appellant; and that certan portions of said debts were secured by said William A. and Ellen Yeazel; that the appellant was the owner of all the capital stock of the company; and that the said first parties were desirous that all claims and debts of the creditors be placed under the control and management of one person to be designated as trustee; and to give security for the payment of several amounts of indebtedness; and to arrange for carrying on the business of the company under the supervision of the trustee. And it was stipulated in the contract that William A. Yeazel and Ellen Yeazel, were to execute and deliver to the trustee a trust deed for Thirty-five thousand ($35,000.00) dollars on 348½ acres of land which they owned in Vermillion county, for the purpose of securing the parties of the second part who held notes bearing the signatures of William A. and Ellen Yeazel for the several amounts due such parties, as specified in the agreement; and William A. and Ellen Yeazel agreed to convey by warranty deed to the trustee, the 348½ acres of land referred to, which deed however was not to be recorded until the conditions mentioned in the contract were performed; and it was also stipulated in the contract that the trustee would endeavor to negotiate a loan on said land or such part thereof as would be necessary, and in an amount sufficient to purchase the chattel mortgage held by the Farmers National Bank of Rossville; and to raise money sufficient to operate and carry on the business of said company; and to discharge other pressiing indebtednesss as might be necessary to pay, upon finding a person who was ready to loan said money, the same to be borrowed upon the mortgage and note of said William A. and Ellen Yeazel, as a first lien upon said land; and in the event, that such a loan was made, the proceeds were to be paid to the trustee; and upon receiving the money derived from said loan, the trustee was authorized to release said trust deed for Thirty-five thousand ($35,00.-00) dollars, but not to discharge the indebtedness

secured thereby;

and that upon the procuring of said loan, the said warranty deed was to be recorded that the said trustee was to acquire the chattel mortgage held by the Farmers National Bank of Rossville; and that the said chattel mortgage acquired was to be held by said trustee for the benefit of the creditors of said first parties as in the contract specified; and the appellant agreed to assign and transfer to the trustee all the capital stock of the company. It is further stipulated in the contract, that the trustee be authorized and have power to borrow money upon the real estate referred to, in addition to the loan above specified, in an amount sufficient to carry on the business of the company; and for the purpose of borrowing such monies, the trustee was given power and authority to make, execute and deliver a mortgage, deed of trust, or other security, upon said land conveyed to the trustee by William A. and Ellen Yeazel, or of the company; and if deemed necessary by the said trustee, said trustee was to take the proper steps to sell the property of the company, or the interest owned by the appellant, and the stock therein, for the purpose of discharging any and all of said debts. It was further stipulated that the trustee in addition to holding the title to the property agreed to be conveyed to it, for the purpose of securing a loan thereon, should hold said property for the purpose of securing the payment of the indebtedness to George Musk, The Farmers National Bank, Burwash Bros., S. J. Miller, Philip Cadle, J. S. Christman, and C. J. and C. K. Palmer, out of the property conveyed by said William A. and Ellen Yeazel; and by the company and by the appellant; and for the purpose of paying the claim of the Farmers National Bank of Rossville out of the assets transferred and conveyed by said company; and that the trustee is securing said payments of said several amounts due to the last mentioned creditors, should save and preserve for them and each of them the respective securities against the respective first parties that they then held; the trustee was

also authorized to operate, carry on and manage the business of the company; and was given full power and authority to sell the plant or property of said company, or any part thereof, upon the best terms obtainable, and apply the money derived from the sale of any of the property owned by the company or the appellant, first, toward the payment of any money borrowed or raised by said trustee to operate said business, and to pay necessary current bills of said company; and the balance of the money, if any, received from the sale of said property, was to be applied upon the indebtedness owed by the first parties to the other parties named in the contract, in proportion to their several debts. It was also stipulated that all the creditors mentioned in the contract as second parties, agreed to extend the time of payment of their respective claims for a period of one year, and for the purpose of preventing the transfer of said notes and for the purpose of facilitating the collection of the same, agreed to deposit their notes with the trustee and the trustee was to give each of the said creditors a receipt therefor. It was also stipulated that in case the money owing second parties mentioned in said contract was not paid when due, or the interest payments not paid when due, and in case the said creditors to whom indebtedness was at that time owing was not paid when due, under the terms of the contract, then the Trustee should have full power and authority and was thereby vested by all the parties of said contract, with power and authority, after selling all of the property coming into its hands from the said company and the said Frank Yeazel, and after supplying the proceeds thereof in accordance with the priorities specified in said contract, and if any balance then remain unpaid, then to sell the land conveyed by said William A. and Ellen Yeazel, for the payment of the balance of said debts, and the said William A. and Ellen Yeazel should be first given an opportunity to borrow an amount sufficient to discharge all of said debts and if a loan could be procured by the said William A. and Ellen

Yeazel, for such amount, then the trustee should re-convey said real estate above described to them and the money derived from such loan, paid direct to said trustee and distributed to pay off said debts to the creditors mentioned in said contract; but in case the said William A. and Ellen Yeazel were unable or refuse to borrow, or otherwise raise the money necessary to discharge said indebtedness to said trustee, after the application of the proceeds of the sale of the property of said company, then the trustee should proceed to foreclose the right of redemption of the said William A. and Ellen Yeazel, including the allowance of solicitor's fee provided that the said William A. and Ellen Yeazel should have ninety (90) days notice, after said debts became due to raise the money necessary to discharge the lien before foreclosure proceedings should be started. That said trustee should have the right to employ counsel and said trustee and attorney for said trustee, should be paid a resaonable compensation for services rendered. In case there should be other creditors who hold notes or securities signed by any of the first parties to said contract, such persons might become parties to said contract by signing their names thereto at the place designated for additional parties, and such persons should be entitled to the benefits of the provisions of the contract as against the property of such of first parties whose names were signed to the notes, which such several additional parties might hold, subject, however, to the priorities created in said contract in favor of said trustee, and subject to all other conditions and provisions in said contract. The plea further avers, that the said W. A. and Ellen Yeazel, in performance of their part of said contract, executed and delivered to the Commericial Trust and Savings Bank, of Danville, Illinois, their promissory note of April 25, 1921, payable to the order of said Bank, for Thirty- five Thousand ($35,000.00) Dollars, and at the same time executed and delivered to said Bank a trust deed for certain real estate owned by the

said W. A. and Ellen Yeazel and described in said contract, for the purpose of procuring of said second parties to said contract as held notes bearing the signatures of said W. A. and Ellen Yeazel. That at the time of the taking and delivering of the said trust deed by the said W. A. and Ellen Yeazel, W. A. and Ellen Yeazel owned no other property except the real real estate mentioned therein except one small lot of household goods and farming implements, which did not exceed in value, Four Hundred ($400.00) Dollars. That on the 16th day of April, 1921, this defendant was the owner of all the capital stock of said company, and that said capital stock constituted all the property that this defendant at that time owned except a small portion of household goods, which did not exceed in value Three Hundred ($300.00) Dollars. That subsequent to April 16, 1921, and prior to December 22, 1921, this defendant in performance of his part of said contract, assigned and transferred to said Bank, as trustee, all the capital stock of said company for the purpose set forth in said contract. The plea furthed avers that The Farmers National Bank of Rossville. Illinois, gave public notice that on the 26th day of September. 1921, the Bank would sell, at the hour of two o'clock P. M., in accordance to the terms of said chattel mortgage of Janurary 13, 1921, all chattels included in said mortgage; that on the 24th day of September, 1921 the Illinois Electric Company and the Duncan Electric Manufacturing Company, being the creditors of said Alvin Grain and Electric Company, but not partes to the contract of April 16, 1921, filed in the Circuit court of Vermillion county, Illinois, a certain bill praying for a receiver of said company and to have an injunction against the sale of the concrete grain elevator, and other chattels included in said mortgage of January 13, 1921; that a temporary injunction was issued on the 26th day of September, 1921, as prayed in said bill. The plea also avers, that on the 22nd day of December 1921, another contract was entered into by the ap-

pellant and the Alvin Grain & Electric Campany, as parties of the first part; and William A. Yeazel and Ellen Yeazel, as parties of the second part; and the Illinois Electric Company, Duncan Electric Manufacturing Company and the Rossville Electric Light Company, called electrical creditors, as parties of the third part, and certain creditors including the appellee, which are denominated as secured creditors, under the contract of April 16, 1921, as parties of the fourth part; and certain other creditors classified as parties of the fifth part and parties of the sixth part and parties of the seventh part and parties of the eighth part; and the trustee in the agreement or contract of April 16, as party of the ninth part. This second contract recites that all parties to this contract were desirous of reaching an agreement and settlement whereby the interests of all said parties might be adjusted without further litigation and expense; and it sets out the various items of indebtedness, and the amounts due and owing to the various creditors, including the so called electrical creditors; and the amounts due the appellee; and makes provision for settling and adjusting the claims of the electrical creditors by mortgaging all the projerty of the Alvin Grain & Electric Company to secure Twelve Thousand ($12,000.00) Dollars of mortgage gold bonds which were to be paid over to the electrical creditors in discharge of the indebtedness held by them. It also makes provision for the payment of the unsecured creditors from the proceeds of the sale of the wooden elevator of the company, and from the sale of certain corn cribs and shelling machinery. It is also stipulated that the parties of the seventh part, designated as unsecured creditors, agree to accept payment of their several obligations against the Alvin Grain & Electric Company, from the proceeds in the hands of the trustee at the time of entering into the contract, or thereafter coming into its possession from the sale of the wooden grain elevator, and the Five Hundred ($500.00) Dollars for the corn crib and shelling machinery. It is also stipulated that all

parties to the contract agreed to refrain from filing creditors' bills, or any other action against the Alvin Grain & Electric Company, but were to abide by the settlement, compromise, covenants and agreements therein and thereby entered into, as a full, complete and just settlement of all the several interests of all the parties thereto; and the second contract also contains this provision: That it is further understood and agreed by all the parties thereto, that the agreement should not change, modify, alter or affect the contract of April 16, 1921, except insofar as was necessary to carry out the terms of the contract of December 22, 1921. And that said contract of April 16, 1921, was to remain in full force and effect as to all provisions not directly in conflict with the contract of December 22, 1921. It is also averred in the plea, that the parties of the seventh part to said second contract were to receive no payment from the trustee for the several obligations which they held against the Alvin Grain & Electric Company; and it is also averred that the appellee, together with other creditors of the Alvin Grain & Electric Company, after signing the contract of April 16, 1921, deposited with the said trustee named in said contract, his notes of January 6, 1920 and of November 5th, 1920; and left said notes with said trustee until the contract had been fully executed. It is also averred in the plea, that on the 16th day of December, 1922, a cerain bill to foreclose a trust deed mentioned in the contract of April 16, 1921, was filed in the Circuit court of Vermilion County, Illinois, to the October term, A. D. 1922; that a decree of foreclosure was had in said cause; that according to the provisions of said decree, the Master in Chancery of Vermilion County, Illinois, sold the premises described in said decree and filed his report on the 12th day of August, 1924, showing that the premises were sold to one Philip Cadle for Twenty-two Thousand Two Hundred ($22,200.00) Dollars, and showing that said amount was Twenty-three Thousand One Hundred Seventy-two Dollars and Sixty cents

($23,172.60) less than the amount of the debt, interest and costs in said cause; that the proceeds arising from the sale of said premises were paid by said Master in Chancery to the Commercial Trust and Savings Bank, as trustee, as aforesaid; that on October 30, 1924, said trustee distributed to the secured creditors mentioned in the contract of December 22, 1921, the proportionate share of each of said creditors; that the appellee received at that time, Thirteen Hundred and Two Dollars and Thirty cents ($1302.30), the same being his share of the sale of said premises, and on January 6, 1925, the appellee received Six Dollars and Eighty-four cents ($6.84), from said trustee, the same being the appellee's share of the rents and profits then in the hands of said trustee, arising from the premises described in said trust deed. It is also averred in said plea that the note of April 24, 1919, signed by this defendant and others on which note judgment was entered in this case, is the same note that was given by the said Alvin Grain and Electric Company as collateral security to said note of November 5, 1920; that the said note described in the declaration herein was delivered to the plaintiff by the Alvin Grain and Electric Company, for no other consideration whatsoever except as collateral security of said note of November 5, 1920 in the principal sum of Two Thousand ($2000.00) Dollars; that all of said parties to said agreement of December 22, 1921, have performed their respective obligations as provided in said agreement; that all the secured creditors including the plaintiff herein, participated in the proceeds of the sale of the property of the said William A. and Ellen Yeazel and participated in the rents and profits arising from the sale of such property, and nothing further remains to be done under the agreement of December 22, 1921.

It was admitted upon the oral argument of this case, and upon the production of the original of the contract of December 22, 1921, in open court, that the appellee did not sign the same; but it is insisted, that the appellee became a party

to the second contract by participating in the settlement provided for thereby of the claims of the various creditors included within its provisions, on the basis of the rule applicable to such cases, cited from Corpus Juris Vol. 12, page 273, that "it is not necessary that a composition should have been signed by a creditor in order to make it binding upon him and bar an action on the orginal debt. Assent or acquiescence, as by accepting the benefits of the composition or acting under it, is as effective as an actual signing." And it is contended by the appellant, that the two contracts referred to, taken together, constitute a composition agreement; and that the appellee having become a party to such composition by participating in the benefits and settlements and adjustments provided for by the second contract, is bound thereby; and the composition effected, resulted in a release of the debts compound and extinguishes them; and that consequently the creditors, including the appellee, who are parties to the composition, also lose their right to retain or enforce their claims against collateral securities which they may hold.

That a compositiion agreement or the term composition, means an agreement between an embarrassed debtor and two or more of his creditors, made for the purpose of securing to the creditors a part or all of the debtor's property, or property furnished by another, and applying it pro rata, or otherwise as agreed, in discharge of their entire demands. Hunt, Composition at Common Law, p. 352; R. C. L. Vol. 5, page 868; 12 Corpus Jurisp. 251. It is a necessary element however to constitute a composition of the character referred to, that the composition should have procured for the creditor a part or all of his demands; and that he received such part in discharge of his entire demands. There is nothing in the terms of the first contract which which binds the appellee to to a discharge or release of his entire claim by receiving payment of the part provided for his claim under the contract; and it is equally clear from the averments in the plea, that the ap-

pellee did not receive any benefit from, or any payment on claim under the second contract; but that the amounts which he received, namely, $1302.30, as his share of the proceeds of the sale of the premises, and the $6.84 received by him, were for his share of the rents of the premises sold; and were provided for his benefit under the first contract, or the contract of April 16, 1921. Inasmuch as the appellee was not a party to the execution of the second contract, nor by having participated in any pecuniary benefits derived therefrom, he was not bound thereby; and that the claim which he held was not to be satisfied in full by part payment which he received under the first contract. It is apparent, that there was no composition of the appellee's claim; and that the effect of the payments received by him on the indebtedness he held against the Alvin Grain & Electric Company was merely to discharge to the extent of applying the payments as a credit thereon. We conclude therefore, that the allegations of the special plea did not show a legal defense which barred the appellee from recovering a judgement on the note in question, which he held as collateral security.

For the reasons stated judgement is affirmed.

Judgement affirmed.

General No. 8053 Agenda No. 45

October Term, A. D. 1926

Edward H. Richter, Doing Business Under the Style and Firm Name of E. H. Richter and Sons, Appellee.

vs.

Indian Refining Company, a Corporation, Appellant.

Appeal from Sangamon

NIEHAUS, J.

In this case an appeal is prosecuted from a judgment rendered in the circuit court of Sangamon county against the appellant, Indian Refining Company for the sum of $8400.00. The appellee, Edward H. Richter bases his right of recovery on the negligent handling of gasoline by an employe of the appellant, in pouring gasoline into a tank of appellee's automobile truck on the premises of appellee; and negligence in handling the instrumentalities by means of which the process of pouring the gasoline into the tank was accomplished; that by means of such negligence the gasoline was set on fire and several automobiles and buildings owned by the appellee, and goods, wares and merchandise situated therein were damaged and destroyed. The declaration contains two counts. The first count alleges, that the servant and employe of the appellant 'then and there roughly, carelessly and violently pushed and brushed an iron or galvanized funnel against a portion of a certain automobile or automobile truck of the appellee, causing the same to throw sparks whereby in consequence of which said gasoline then and there ignited and was set on fire.' And the second count charges the negligence to be: "That the defendant wholly regardless of its duties in that behalf carelessly and negligently poured and splashed gasoline upon, to-wit, a certain automobile truck and certain electric wires and electric appliances and equipment of said certain automobile truck whereby and in consequence of which said negligent and careless handling

of said gasoline, the said defendant, by its certain servant, caused a fire in and about said certain automobile truck."

The fire in question occurred on the 5th day of July, 1922, in the afternoon of that day, when Mr. Carroll who was employed by the appellant for that purpose, came to the premises of the appellee on the corner of 6th and Reynolds streets in the city of Springfield, to re-fill the gasoline tanks in the several automobiles and automoble truck of the appellee. Edward G. Richter, who is the son of the appellee, and who was present when the fire occurred, testified with reference thereto, as follows: "I had known Mr. Carroll about one year and a half. He was delivering gasoline for the Indian Refining Company. He was delivering at the rear of the garage there—trucks and cars standing there. He had been coming to my father's place of business during that time. On the 5th day of July, 1922, he came there about 3:30 p. m. to fill the trucks with gasoline—see what they needed. I was in the market when he first arrived. I did not talk with him on that occasion—had seen no one talk to him. After he got there, he drove in and filled the Dodge truck that was setting there in the yard with ten gallons of gasoline. He drove in with the auto truck with a tank on it of gasoline—a tank truck, Indian Refining Company. The first truck was setting out in the yard—a Dodge truck. It was used in connection with the meat business. It was my father's truck. After that he went to the garage and put ten gallons in my car setting in the garage. I had a Stevens touring car. Then he starts to fill the little truck, setting in the middle of the garage—the Republic. That is where the fire started. It was setting there in the center of the garage; my car set on the north and another truck sitting on the south—this little truck in the middle setting kind of close to my car. Mr. Carroll started to go through and I told him, 'dad, don't go through there, I will back the truck out for you. ' He said, 'no, I will get to it.' I was standing at the back of the corner of the truck. With that he walks around

the left hand side of the truck, steps up on the truck there. I told him to be careful, he would slip and hurt himself. With that he raised the five gallons of gasoline up over the seat and started pouring. The gasoline went all over the seat, and in a minute I heard a horn blowing and a fire started, just like that. I was about six—eight feet away when I cautioned him about climbing up there. He was to the west of me and I was back of him. I was to the rear of the truck. I saw the gasoline splash and run. It splashed all around the side of it—around the sides—all over the floor boards, around in there—you could see it splash around there. When the fire started he was pouring the gasoline into the truck. He slipped. He got up on the running board and started lifting the gasoline over the steering wheel. As he did his foot slipped and the bucket of gasoline fell into the seat—fell down there and the gasoline spilled all over. As the bucket fell in the seat we could hear the toot of the horn. The seat was turned back. The gasoline can fell right down into the seat, across the battery." He also testified, that the battery in the truck in question was a storage battery used to start the car and electric lights, and for the use of the horn, a regular automobile battery; and that the battery was fully charged with electricity. He further testified that "the horn button on this truck was alongside the seat board on the left side sitting in the seat. The horn button was a round black button—a regular button that you see on regular horns on automobiles—ordinary type of horn button. These horn buttons are not water tight because they have to work back and forth when you push them in that causes the contact, as I understand, for the horn to blow. They are not water tight—gasoline tight." J. F. Maddox who is an automobile mechanic of fifteen years experience, testified as an expert having special knowledge of electric batteries and electric wiring, electric horn buttons and horns and electric equipment generally on automobiles and automobile trucks, and the emission of sparks in the operation of electric horns and horn buttons, and that he was acquainted with

the Republic automobile truck in question. He testified that the ordinary horn button on a Republic truck throws a spark when it is operated; that it throws a spark every time a contact is made and broken, that is to say, every time the horn is blown; and that the spark thrown by the operation of the horn button would ignite gasoline. He also testified, that in case a connection was formulated between the two posts of the battery, together with any metal substance, as a gasoline can, falling on a battery and striking the posts of a battery, it would be likely to cause gasoline to ignite. W. L. Chapin, who testified that he had taken a course of electrical engineering in the University of Illinois and made a study and experimented with electrical equipment of automobiles and automobile trucks, and in reference to batteries and horn buttons and electric wires, and was familiar with the character of batteries and horn buttons and electrical equipment on the Republic truck. He testified as an expert, that the horn button would throw a spark whenever it was operated, that is to say, every time it was touched, also that if gasoline was poured on the horn button it could get in the horn button, and that the ignition power of the spark thrown was sufficent to ignite gasoline. Frank Offer was called as a witness for the appellee, and testified, that he was in the automobile business and familiar with Republic trucks, and with the truck owned by the appellee; that the truck of the appellee "had a horn button which was on the left hand side, inside the seat riser—against the seat riser." That "it is a button that fastens on and about the size of a quarter. There was nothing about the construction of the horn button to guard it against any liquid running through and getting on the contacts and wires of the horn button." As a witness for the defense, the appellant called Thomas C. Carroll, its employe, who did the refilling of the gasoline tanks on the automobiles in question. He testified with reference to the occurence in question: "I put the funnel in the gasoline tank and took five gallons of gasoline and I set it down in the seat. **** After

I placed the funnel in the gasoline tank I set five gallons of gasoline upon the seat. The gasoline was in a five gallon measure, in a five gallon bucket. I set the can on a kind of a board or slat piece there. *** Then I reached over and got a hold of the funnel with my left hand. The funnel was in the gas tank at that time and I raised it up and got the point of the bucket before I started to pour in; when the gas went into the funnel it went to the ceiling. Q. What do you mean by it went to the ceiling, A. Flame,—ignited; I threw everything away and got out of there. The gas was in the funnel when it shot up. *** I didn't hear no explosion. *** The flame shot up just as I started to pour. The gasoline was probably still in the funnel, I don't know; that is a little too close for me to figure on. At or before this time I testified the flame shot up, I did not spill any gasoline on any wires or on any part of this Republic truck. Before this flame shot up I did not spill any gasoline on the batteries or the electrical equipment of the truck. At no time before the flame shot up did I slip or fall. After the flame shot up, I dropped the can."

Carroll and Richter were the only eye witnesses to the occurrence; and considering the reasonable and just inferences which the jury would be warranted in drawing from the testimony of these witnesses, this court would not be justified in holding that the verdict rendered in this case was manifestly against the weight of the evidence; especially since a determination of this question, to some extent at least. involves the respective credibility of the witnesses, which was a matter for the determination of the jury.

The record does not disclose any substantial error in the admission or rejection of evidence. It is contended by the appellant that the court erred in admitting the testimony of the expert witnesses in reference to the effect which a contact with the electrical horn button would have to cause sparks and ignition

of gasoline. We are of opinion, that this expert testimony was competent; especially in view of the evidence, that while Carroll was going through the process of refilling the tank of the truck in question, and just before the blaze which started the fire, that the horn was blown. Expert testimony is competent as to matters which do not lie within the range of common knowledge and experience. **Elgin, Joliet & Eastern Ry. Co.** v. **Myers** 129 Ill. App. 12; **Byer v. Peoria B. & C. Traction Co.** 156 Ill. App. 47. **Traders Ins. Co. v. Catlin** 163 Ill. 256; **German American Ins. Co.** v. **Steiger** 109 Ill. 256; **Mahlstedt v. Ideal Lighting Co.** 271 Ill. 154.

It is assigned as error, that the court refused an instruction at the close of the evidence, directing the jury to find a separate verdict of not guilty under the first count, because of the insufficiency of the evidence to sustain the charge of negligence contained in that count. The question of the sufficiency of evidence to prove any of the issues involved in the trial of a case, is for the jury to determine. And we are of the opinion therefore, that the court did not err in refusing to instruct the jury that the evidence was insufficient to support the charge of the negligence contained in the first count.

It is also contended, that the coutr erred in the giving of the first and third instructions for the appellee. The first instruction is as follows:

> The Court instructs the jury that in determining whether or not the defendant was guilty of negligence in this case, you should consider what a reasonable prudent man would have done under the like or similar circumstances, in the handling of gasoline or other inflammable materials; and if you believe from a preponderance of the evidence that the defendant, by its servant, failed to exercise that degree of care as would have been exercised under like or similar circumstances by a reasonable prudent man, and that such failure, if any, on the part of the defendant's servant to exercise such degree of care was the proximate cause of the fire which destroyed plaintiff's property, then and in that case you should find the defendant guilty of negligence.

It is contended by the appellant that the negligence referred to is not limited to the negligence charged in the declaration. It is true, that the instruction does not in express terms refer

to the negligence charged in the declaration; but the purport of the instruction is such that the jury could not have been misled into thinking, that the definition of negligence had reference to any other negligence than that charged in the declaration. The charge of negligence in the second count of the declaration is, that the appellant carelessly handled the gasoline and oils in delivering them to the appellee, and it thereby caused the fire. It is sufficient to say, concerning appellant's contention, that if there is error in this instruction the same error is contained in the third instruction given for the appellant; and that therefore the appellant is not in position to raise any question about it on appeal. In our opinion the third instruction complained of by appellant, is not subject to the criticism of the appellant concerning its purport and effect; nor do we find any error in the refusal of instructions requested by the appellant.

It is also contended, that the trial court erred in its refusal to grant a new trial on account of certain newly discovered evidence. The newly discovered evidence is set forth in an affidavit made by one F. J. Scott, an employe, who had been working for the appellant as a traveling salesman for about eight years prior to the time of the making of the affidavit. He states in the affidavit, that on or about July 6, 1922, he was doing special work for the appellant in Springfield; the day mentioned being the day after the Richter fire; that he had an interview with Edward G. Richter, one of appellee's witnesses, while the buildings, which were destroyed, were still smouldering; that in this interview he asked Richter how the fire happened, whereupon Richter, in answer to his question said this: "Why your man spilled some gas while he was filling the Stevens car, and I, or some of us, threw a match in the spilled gas. I walked over to a truck with the Indian Refining man to fill it, looked up, and the place was in a blaze." He further states, that he did not communicate what Richter had said to him, to the appellant until over four years

had elapsed, when he happened to hear about the verdict which had been returned in this case; and he then immediately reported this evidence to the district manager of the company at Lawrenceville, Illinois, who communicated it to one of the attorneys for the appellant. The reason given by the affiant for not letting the appellant know about what he had learned about the cause of the fire sooner, is that he had not been employed in and around Springfield since the time he had obtained the information; and that he knew nothing about the pendency of this suit; and had known nothing about the setting of the case for trial; either the first or the second trial. It is sufficient to point out concerning this affidavit, that it discloses a remarkable lack of diligence on the part of the appellant employe, who was apparently investigating the cause of the Richter fire, in the origin of which his employer was involved, to communicate the information which he says he obtained, to his employer; and the affidavit also shows a lack of diligence on the part of the employer, to find out from the employe, what knowledge he had about the case. Aside from the lack of diligence which appears on the face of the affidavit, it is obvious that the evidence referred to pertains only to matters which could be used in an effort to contradict or impeach one of the appellee's witnesses; and it is well settled that where newly discovered evidence is not conclusive in its character, but is merely cumulative or contradictory of other evidence; or in its nature impeaching, it affords no ground for granting a new trial. **Springer v. Schultz** 105 Ill. App. 544; **Knickerbocker Ins. Co. v. Gould** 80 Ill. 388; **Tobin v. People** 101 Ill. 121; **Kendall v. Limberg** 69 Ill. 355; **City of Paris v. Morrell** 52 Ill. App. 121.

For the reasons stated, the judgment is affirmed.

Affirmed.

General No. 8058 Agenda No. 33

October Term, A. D. 1926

Mary A. Bergman, et al, Appellees.

vs.

Sarah J. Rhodes, et al, Appellants

Appeal from Macoupin

NIEHAUS, J.

In this case the appellees, Mary A. Bergman as an individual, and as trustee under the will of Henry Brayford, deceased; and Theresa M. Pratt and Virginia E. Durston, filed a bill in equity in the circuit court of Macoupin county, making Sarah J. Rhodes the appellant and her husband, Frank Rhodes, parties defendant. The bill avers the death of Henry Brayford, who died testate December 2, 1901, and the probate of his last will and testament, which disposes of certain real estate, including 652 acres of land, situated in Polk township; also 80 acres in Carlinville township, all in Macoupin county, and a farm approximately 93 acres in Madison county, and a residence lot in the city of Carlinville. The bill avers, that he left surviving him Mary A. Brayford his widow, who was also deceased at the time of the filing of the bill, and four children, namely, the appellant Sarah J. Rhodes and the appellees Mary A. Bergman, Theresa M. Pratt and Virginia E. Durston, who were his only heirs at law; and were also devisees under the will. The bill was filed for the purpose of carrying into effect the following provision of the will:

"I direct that at the death of my wife, Mary A. Brayford, or as soon thereafter as practicable, the surviving trustees, acting under this will, shall sell and convey by good and sufficient deeds all the said remainder residue of my estate in such manner and on such terms as they may deem best, and shall divide the net proceeds of said sale equally among my said daughters. In the event of the death of any of my said daughters before the distribution of said proceeds of said sale, leaving bodily descendants, then I direct that the share of such deceased daughter be divided equally among her said bodily descendants."

And the prayer of the bill is for an order and decree for the sale and distribution of the property by the surviving trustees under

the will as therein directed. Summons was issued and served on the defendants in the bill; and they appeared in court at the June term following and thereupon joined with the complainants in the bill in asking leave of court to amend the original bill by making all the parties thereto, parties complainant, and changing the purpose and the prayer of the original bill. The amended bill which was thereafter filed by leave of court avers, that all the complainants are of opinion, that a sale of the real estate involved as provided for in the last will and testament of Henry Brayford, deceased, for their benefit, would result in a sacrifice of their respective interests, because the prices of all farm lands were low and the market for the same poor; and that these lands if sold by the trustees at that time would not realize a price actually representing their value; that because of these unsatisfactory conditions, they would sustain a loss if the real estate were sold at public auction; and that they had therefore decided to exercise their right of election, and that each one had elected to take her one fourth share of the real estate in land instead of money; and they waived a right to the sale by the trustees and had agreed that this proceeding might be treated as a partition proceeding for that purpose, so that the share of each of them in the proceeds of a sale might be set off to them in severalty in the land. The bill prays the court, that a decree may be entered confirming their election to take their share in the land, and that they may be decreed to be owners thereof as tenants in common; and that the lands may be partitioned between them in kind; and that commissioners may be appointed and empowered by the court for this purpose to make such division and partition between the parties; and to assign and set off to each of them the full equal one fourth part of said lands in severalty, so that each of them might own and control her separate portion of said estate in severalty. Thereafter a decree was rendered in which the court finds, that each of the

parties mentioned who were complainants in the amended bill, had agreed that such land should not be sold by the trustees, but in lieu of such sale had elected to take their respective shares or interests in the property in land instead of money; and the court also finds, that such election is a reasonable one, and is approved by the court; and that a sale of the real estate as provided for in the will by the trustees would result in a sacrifice of the property and a great loss to each of the parties interested. Commissioners were thereupon appointed to make the partition of the premises referred to, in accordance with the prayer of the bill; and the commissioners appointed made their report, in which they set off and allotted to each of the parties complainant in the bill certain parts of the premises described in the bill, on the basis of valuations fixed by them, on the respective parts and parcels which the parties were to take in severalty. No objections were filed to this report of the commissioners; and the court confirmed the same; but later, during the same term, a motion was made by the appellees to set aside the report of the commissioners; and the motion was supported by affidavits concerning the fairness of the division between the parties, and the correctness of the valuations made by the commissioners, and legality of the action of the commissioners in fixing owelty. Leave was given to the appellant to file counter affidavits concerning the same matter. Afterwards upon hearing, the court vacated the decree confirming the partition of the premises; also set aside and vacated the report of the commissioners on the ground that it did not make an equal and fair partition and division of the land between the parties; and the court then appointed other commissioners to divide and partition the land, as directed in the decree referred to. The commissioners last appointed made a report, that the premises were not susceptible of division or partition without manifest prejudice to the parties in interest, and made an appraisement of the values of the different tracts and parcels.

The appellant filed objections to the report of the commissioners; and a hearing was had upon the objections; and the report of the commissioners was approved, and the court entered a decree for the sale of the premises as in a statutory partition. An appeal is now prosecuted from the order of the court overruling appellant's objections to the report of the commissioners and from the decree directing the premises to be sold.

One of the contentions made by the appellant is, that the decree confirming the report of the first commissioners which made a partition and division of the lands with a provision for owelty was in effect a consent decree. The record does not show that this decree was entered by consent of all the parties to the same, but merely that no objections were filed to the same; and the record also shows, that the motion to set aside the order confirming the report and the division of the land made was made at the same term in which the report was filed and the decree of confirmation; and it was therefore within the power of the court to vacate the same; but the questions concerning the propriety of setting aside the order of confirmation are not involved in this appeal. We are of opinion, however, that the decree of sale entered was improvidently entered, and was not in conformity with the relief prayed for and decreed. The purpose of the amended bill and the prayer thereof, as well as the decree rendered in conformity therewith, were to divide the premises in kind; and to prevent a sale by having the premises divided among the parties in kind, for the reasons set forth in the bill, and found in the decree. The amended bill and the prayer for the Equitable Relief sought and the decree of the court entered in conformity therewith, rests upon the presumption which is conclusively established by the averments of the bill, that the premises involved are susceptible of partition or division in kind. The appointment of the commissioners was for the purpose of carrying into effect the relief granted, namely, to effectuate a division and partition of the premises in kind; and this was the only function of the com-

missioners appointed in the decree referred to; and when the second commissioners reported their inability to make division or partition required by the decree, it was within the power of the court to appoint other commissioners to make such partition or division, as the decree required to be made. It does not necessarily follow that because of the inability of one set of commissioners to make a partition or division in kind among the parties, that other commissioners will not be able to do so; but the decree for the sale of the premises is in direct contravention of the relief granted on the averments and prayer of the amended bill. ~~If a division of the premises cannot be made in kind as the decree provides, then the trust provisions in the will of Henry Brayford for the sale of the property and division of the proceeds thereof must be carried into effect, and a sale of the premises carried on in accordance with those provisions.~~

For the reasons stated, the decree of sale is reversed, and the cause remanded with directions to sustain the objections to the report of the commissioners, and enter an order appointing new commissioners to make partition or division in conformity with the decree entered granting the relief prayed for.

Reversed and remanded with directions.

Gen. No. 8033 Agenda 38

October Term, A. D. 1926

Jasper W. Stringer and Melvina Stringer, Appellants,

vs.

T. E. Burner and D. L. Burner et al, Appellees.

Appeal from the Circuit Court of Hancock County

SHURTLEFF, J.

Appellants, husband and wife, who were complainants in the circuit court, filed their bill in chancery to rescind a contract of purchase by them of real estate from appellees, on the ground of fraud, and to establish an equitable lien against the lands for the amount of an advancement of $31,800 made upon the purchase price at the time the contract was made, and to have such lien take priority over a second mortgage executed by appellees about twenty months after the contract was made. Appellants had been farmers in Iowa for several years and owned land in that state, later had purchased farm lands in Knox County, Illinois, where they had farmed about 240 acres of land for seventeen years, and about four years prior to the transaction in question had sold their lands in Knox County, retired and were living in Peoria, where they owned a home valued at about fifteen thousand dollars. Appellants held a second mortgage for ten thousand dollars upon eleven hundred acres of land in Indiana (subject to a first mortgage of thirty thousand dollars) negotiated to them by Benjamin C. Koch and Oliver J. Hamm as B. C. Koch and Co. of Peoria, which did not become due until March 1, 1922, and appellants owned no other property.

Jasper W. Stringer was fifty-eight years of age and his wife forty-seven, and they had owned their lands in common. Appellants knew something about Hancock county lands as they held a mortgage

amount-
ing to $31,800 upon lands a few miles from the lands in question, acquired either by trading or by means of a loan. Appellees, whom we shall treat as the parties defendant, principally interested, resided in Carthage and owned the 34,209 acres of land lying about five miles northwest of Carthage in Prairie Township and described as the north half of section 8. Appellees' lands were encumbered by mortgage to the extent of forty thousand dollars. The other defendants were William M. Gordon and William M. Gordon, trustee, the O'Harra Farm Loan Company, First National Bank of Augusta, Farmers State Bank of Mendon, Kendall Brothers, the Peoples State Bank of Hamilton, State Bank of Adrian, Farmers Bank of Bowen, Marine Trust Company of Carthage, Hancock County National Bank of Carthage and Scott Belknap. All of these defendants are interested by reason of being the holders of certain notes secured by second mortgage on the farm in question, given about the first day of March, 1922, to secure **bona fide** indebtedness of the appellees, amounting to the sum of about seventy thousand dollars.

The contract in question was entered into between appellants and appellees on June 23, 1920, by which appellants agreed to purchase 342.09 acres of land from appellees at the price of three hundred dollars an acre, making a total sum of $102,627. Appellants made a first payment of $31,800 at the time the contract was entered into, assumed the payment of the first mortgage, amounting to forty thousand dollars, and were to make the final payment of $30,827 upon March 1, 1921, when possession of the lands was to be delivered to appellants and deed given.

Clyde Johnson was an attorney forty-three years of age, and had been State's Attorney of Hancock County and resided in Carthage. Johnson and E. G McAnnulty of Carthage in the summer and fall of 1919 listed some farm lands in Hancock County for sale and among others the tract belonging to appellees. Two of appellants'

principal witnesses, Oliver J. Hamm and Benjamin Koch, lived in Peoria and were engaged in the real estate buisness. It had been arranged between Hamm and Koch on the one part, and Johnson and McAnnulty on the other, that Johnson and McAnnulty should list the lands in Hancock County for sale, and that Hamm and Koch in Peoria should procure the buyers. Hamm and Koch had negotiated a second mortgage for ten thousand dollars on lands in Indiana to appellants, upon which they received a commission of two hundred dollars, and in September, 1919, Hamm had persuaded the appellants to look over the lands in Hancock County. Hamm was thirty-seven years of age. He was manager of the sales department of the Wayne water softener appliances and Domestic Electric Supply company, and had been so engaged for eleven years. He also did some real estate business out of Koch's office. He apparently knew little about land from practical experience. Koch had been a farmer engaged in the electric light business at Freemont and in the real estate business at Peoria. Koch testified to no representations made about the farm or the land. He did talk some with Johnson about the tiling on the farm but nothing was said by Johnson as to tiling which in any manner misrepresented the land. There is no testimony tending to show that Johnson had any practical experience as to soils and land except that which he acquired in 1919 and 1920 in making a few farm sales. It appears also that appellants became interested in the profits that were being acquired in the rapid rise in price of farm lands at just that time, as Hamm wrote McAnnulty in December 1, 1919, after appellants had looked over various farms in Hancock County and appellees' land in September previously, as follows:

"Mr. and Mrs. Stringer called at our office today and are somewhat interested in the 320 acres of land you mentioned in your last letter. They also have a party who is interested in a good 160 acre tract and will bring them with them to inspect it when

they come. They are very anxious that Mr. Johnson should be on hand to show them the land and are now planning on coming over with Mr. Koch and myself the first part of next week."

It is admitted that appellant's mortgage for $31,-800 was "on the Cook land out here southeast of Carthage." How they obtained it the record does not show. Hamm, the principal witness for appellants, testified "that the Stringers were good judges of dirt, good judges of soil" and in a letter written to Koch under the date of January 22, 1921, Hamm writes: "He is certainly hard boiled but I believe he will see that he had better take it now while he has a chance to get it." Hamm had been acquainted with the appellants since the middle of July, 1919, and about the middle of September, 1919, he took them to Carthage to be shown Hancock County lands by Johnson and McAnnulty. While Apppellant Stringer testified that he was purchasing the 342 acres "for a home," it is evident that he did not have sufficient funds or property to complete the contract, mortgaged as it was for forty thousand dollars, but it is distinctly shown by appellants that Koch was to furnish whatever funds appellants might be lacking to complete the purchase. Appellant Stringer, his wife and Hamm testified that in looking over the land in September, 1919, Johnson said to them; "I have 342 acres in this tract of land listed from Mr. Burner, or from the Burners, for sale, at $300 per acre." Mr. Stringer said, 'this farm looks rather level and flat to me, is there any tile on the place?' Mr. Johnson stated that there was a small string of tile near this line where we were at this time, he also stated, or Mr. Stringer asked Mr. Johnson, what kind of soil he had on this farm. Mr. Johnson says, 'We have from two and a half to three and a half feet of right black soil, underlaid with a yellow jointed subsoil, which will drain perfectly.' He said, 'When there are a few more tile in the land, this farm will be one of the best farms in Hancock

County, if not the best.' He said, 'There is a fall to the southwest of, I believe, from five to seven feet to the mile, which will aid in the draining of this farm.' "

They drove around the farm and alighted from the machine and went upon different parts of the farm. It is shown that before going to the farm the second time Appellant Stringer asked Johnson to get a spade and Johnson said he would get a dirt auger, and that he did go to some place in Carthage and returned and said the party who had the auger was not at home. No mention of spade or dirt auger was made by any of the parties after that time. On this trip the party drove to and examined the work of a tile digging machine and the layers of dirt in the drain to depth of about five feet, about a mile and a half north of appellees' land, and pronounced the soil very satisfactory. Substantially the same party examined appellee's land the next day a second time on the September trip and examined other lands and farms and were back again examining farms and appellees' lands about the middle of October, 1919, at which time Appellant Stringer testifies that he stated that appellee's land was very level and again inquired the nature of the soil, and Appellant Stringer and Hamm both testified that Johnson again described the lands in the same identical language that he had twice before, always emphasizing that the land was underlaid with a "double-jointed yellow clay." On this trip the party examined another tile digging machine at work to the south and east of appellees' land and found the nature of the soil very satisfactory with black or brown dirt on the surface, underlaid with a yellow clay. On the trip in October, 1919, appellants first met Appellant Burner and as to this meeting Appellant Stringer testifies:

"Went up to get the blueprints. Hamm, Johnson and I drove up. Met him in the back yard. Burner said he had a blueprint of the ditch where the tile should go somewhere about the place, but he

didn't know where to find it, but he would try and look it up later on and furnish it to me; and as to the hedge posts, he wouldn't put them in the deal with the farm but he would take the price of cutting."

Appellant Stringer further testifies: "I didn't see the farm again until the latter part of May, 1920; went with Hamm and met Johnson at the hotel; went to the east side of the farm where they were plowing corn. The corn was irregular. Johnson said they had a late spring and couldn't get the land ready to put the crop in. Hamm and I walked to the hedge posts. Johnson got in the car and drove to the north set of improvements. After seeing the stumps I walked with Hamm toward the north set of improvements and discovered a pond and some stumps where an orchard had been; asked Johnson about the pond. He said a little string of tile would take care of it very nicely; saw clover field on the west side. Johnson never took him on the west part of the farm to show him the soil; left the farm and when going along the road Johnson said, 'There is some yellow clay sticking out of the side of the bank.' He said, 'There is a fair sample of the clay that is on this Burner farm.'"

Upon returning to Carthage the party saw appellee at a garage he was building and Appellant Stringer testifies: "I talked to him in the presence of wife, Hamm and Johnson; told him that I liked the farm but didn't like the buildings and fences; thought they were poor and thought $300 an acre was too much. Burner said I wasn't buying the buildings or improvements. He said I was buying real Illinois farm land, and he went on to tell me that the farm had a black soil two and a half to three and a half feet deep all over the farm; that it had a yellow double-jointed clay sub-soil all over the farm; that it needed a few tile, but after the tile was in there the land was such that it would drain very readily, and it drained to the southwest, and at the southwest it had a natural outlet. I told him that I thought $300 an acre was too much.

He said he had already turned down an offer of $300 an acre for it and he wouldn't take anything else. He said he was going away and Mr. O'Harra had the right to close the deal. I thought the price was too great and we went home."

After making the three trips to Carthage and the four examinations of the farm extending from the middle of September, 1919, to the latter part of May, 1920, appellants testified that they had concluded not to buy the farm; they considered the price too high. After this in June, 1920, the witness Hamm testifies that he sent for Johnson to come to Peoria to again persuade appellants to purchase the land, and that Johnson came to Peoria and met Hamm at Koch's office and sent for appellants. Appellants went to Koch's office in the evening and met Hamm and Johnson. Stringer testifies that they persuaded him and his wife to go once more and look at the land; that they never had inquired of the tenants on the farm anything about the land; that Johnson had told him that Burner was all right and a truthful fellow, and more than that they had told him that Johnson was. Hamm had told him that Mr. Johnson was one of the leading men in the church and that he was a very nice, honest and truthful man, and that Mr. Burner was one of the head men in the church and was a very truthful man. Stringer further testified that Hamm had told him a number of times the church which he (Hamm) belonged to, but he had forgotten which one it was. He knew that Hamm attended church in Peoria. Appellants were Methodists. This testimony is enlightening as tending to show the measures adopted by the witness Hamm to have the sale made to his clients, the appellants, and the later turmoil in which he embroiled his fellow churchmen after he had secured his commission and the bottom had dropped out of land values.

Appellant Stringer testified that no one ever called his attention to any white spots on the farm; that he relied on the statements that the farm had a surface soil of two and a half to three

and a half feet deep on top of double-jointed yellow clay, and that it would drain perfectly. In fact, in the record the depth of the soil and that it was under laid by a "doubled-jointed yellow clay" is repeated so many times in those exact terms by appellants and Hamm that it loses much of its descriptive force. From the record it would appear that each time appellants or either of them met Johnson or, Appellee Burner Stringer inquired each time as to the drainage qualities of the land and particularly as to the nature of the soil, and the stereotyped answer received—always in the same identical language—impresses this court that appellants had not relied upon any of the former statements made by Johnson or appellee. On the trip to Carthage about May 20, 1920, they talked with Appellee Burner and Hamm testifies: "Mr. Stringer said to Mr. Burner, he says, 'we have been out and looked over your farm and,' he says, 'it looks pretty flat to me,' and Mr. Burner told him that he had figured on tiling the farm, it had sufficient fall, from five to seven feet to the mile fall to the southwest corner to drain it perfectly, if it was tiled, and then Mr. Stringer asked him about the uniformity of the soil and Burner assured him that the whole farm was one uniform grade of soil all over the entire farm. It was black loam soil **from two and a half to three and a half feet deep and was all underlaid with double-jointed yellow clay subsoil**, and if tiled it would drain perfectly, and said he was not very anxious to sell the farm. Stringer offered him $90,000 and he refused it. Then he told Stringer that he was going to the Democratic Convention and if you decide to come to my terms I have appointed O'Harra, O'Harra and O'Harra to transact my business for me and have authorized them to close the deal, and Mr. Stringer also brought up the question about the improvements and the quality of the improvements, and Burner told him, 'you are not buying improvements, you are buying black land and it always raised a good crop with even one string of tile on the farm.' He says, 'I never

had a crop failure on the farm.' He said, 'I will leave it with the law firm of O'Harra, O'Harra & O'Harra.' He did not mention Johnson."

As to this meeting with Appellee Burner Mr. Stringer testifies: "Mr. Burner came out to the car and we had a little talk about the farm. I told him I liked the lay of the farm very much, butI didn't like the buildings and fences, they were very poor, and I thought $300 an acre was too much for the farm. He said I wasn't buying the buildings and improvements, he said I was buying real Illinois farm land, and he went on to tell me that the farm had a black soil two and a half to three feet deep all over the farm; that it had a yellow double-jointed clay subsoil all over the farm; that it needed a few tile but after the tile was in there, the land was such that it would drain very readily and it drained to the southwest and had a natural outlet. He said he had already turned down an offer of $300 an acre for it and would not take any less. He said he was going away somewhere, I don't know just where, and he says, 'I am in a hurry and Mr. Johnson knows what I want for the farm; he has got the farm for sale, and if you do make up your mind to buy the farm Mr. O'Harra has the right to close the deal and sign our names, my name and Mrs. Burner's name.'"

After this meeting appellants returned to Peoria and had concluded not to purchase the land. Appellants did not purchase the land until Johnson went to Peoria at Hamm's solicitation about June 20, 1920, and persuaded appellants to go to Carthage and look the land over again. As to this trip Hamm testifies: Mr. and Mrs. Stringer were urged to make another investigation of the farm. They came over on the trip when the contract was executed. Met Johnson at the hotel by appointment; went out to the farm. Johnson again told the Stringers that the soil was uniform, was underlaid with a double-jointed yellow clay and if tiled would drain perfectly; went to O'Harra's office with Clyde Johnson to draw the contract. O'Harra said he had power of attorney. O'Harra said, "I have always considered this farm the best farm in Hancock County," and

says, "You are not making any mistake in buying this farm, that the farm would be worth $500 an acre in less than two years' time."

Appellant Stringer testifies that in a few days Johnson came to Peoria and about eight o'clock in the evening someone called him from Koch's office and he and Mrs. Stringer went down there and met Johnson and Hamm. He testifies Johnson said: " 'I would rather sell you that farm because I want to sell you a good farm,' and he asked me if I would come back to Carthage and look it over once more and make up my mind as to what I would do, so I came back to Carthage and had another talk with Mr. Johnson. Mr. Johnson said to me: 'It is a mighty good farm and that I was lucky to get it for $300 an acre; that he knew that Mr. Burner had been offered $300 an acre for it and had turned it down.' We finally decided to take the farm over in McAnnulty's office.

We have quoted from the testimony in the record and it is the only place found where either of these witneses have omitted the representation as to double-jointed yellow clay under a black loam about three feet in thickness. The contract was executed in O'Harra's office on June 23, 1920. O'Harra had a power of attorney given him to execute the contract for appellees upon specific terms. Before going to Carthage, appellant went to his safety deposit box and took out his thirty thousand dollar mortgage and took it with him to Carthage. At O'Harra's office appellant stated that appellee ought to let appellants have some hedge posts, and O'Harra stated that he was not making any trade. The contract was discussed and O'Harra stated that he had no authority to change the terms of the contract or his authority; that if appellants did not want the farm on appellees' terms, it was all right, they need not take it. Appellants signed the contract. It was under seal, a simple contract to purchase the lands upon the terms agreed upon. Appellant Stringer states

upon cross-examination that in examining the farm his mind was never upon the nature of the soil and he had been told what the soil was by Johnson and Burner and that he relied upon their statements and never inquired further about it. There is no testimony in this case or claim that Appellee D. L. Burner ever made any statement about the soil or farm, or that she was a party to any of the conversations or had any knowledge upon the subject of any kind.

The record in this case is voluminous and it would be impossible to cover all of it. We can only set out the salient points. The contract covered the land and certain posts, wire and material which appellants were to have at cost price. Appellants were to assume the payment of the forty thousand dollar mortgage and the interest after March 1, 1921. Appellants were to have the rents upon the land from the date of the contract in compensation for the interest upon appellants' mortgage of thirty thousand dollars, upon which March 1, 1921, there would be eighteen hundred dollars in interest due. Appellees also, by the contract, transferred their right under existing leases to appellants to go upon the lands and plow after the crops were removed and to make repairs, and the contract covers and transfers a telephone and wiring upon the farm and in all respects conforms to the power of attorney held by O'Harra, the attorney in fact.

After the execution of this contract, appellants, in the summer and fall of 1920, visited the farm, drove around it and were upon it and, as Appellant Stringer testifies, "were very proud of it." They entered into leases with the tenants upon the farm for further term after March 1, 1921, when the contract with appellees was to be completed. In the fall of 1920, as shown by all of the testimony, the bottom in farm lands had collapsed— the "bubble had burst." That fall and winter appellants strenuously attempted to collect the Indiana mortgage for ten thousand dollars, but without

success. The testimony shows no attempt on the part of appellants to sell their home in Peoria, but Koch did negotiate a mortgage upon it for $7,500 which appellants learned in January, 1921, could not be carried through or the moneys furnished. As early as January 3, 1921, Hamm is writing McAnnulty that appellants would require ten thousand dollars more than they could raise to complete the contract and suggesting that appellees take a second mortgage back on the lands for the amount. A few days prior to March 1, 1921, Hamm and appellants went to Carthage and went over the matter with Appellee Burner, and stated they would not be able to complete the contract and had no funds on hand to apply at that time. Appellee Burner told them not to worry about the matter but to go home and he would give them time to raise the funds, but no particular time was mentioned. On the evening of March 1, 1921, Appellee Burner, with his brother, appeared at the home of appellants in Peoria and tendered a deed and had a contract signed, the terms of which would extend the time of payment for appellants ten days. Appellants sent for Hamm. He came and advised appellants not to sign the contract. Later, after the Burners had left, Hamm advised appellants to see a lawyer. Up to this time appellants had made no complaint about the land and testify they were pleased with the purchase and ready to acept the farm. Hamm took them to a lawyer, as Appellant Stringer testifies, to see about selling part of the farm to complete the contract. They went to Carthage with the lawyer, as Appellant Stringer testifies, to see if the lawyer would advise his client to purchase a part of the land. Appellant Stringer testifies that the first place they went to in Carthage was to the "Advisor's" office to see a soil map, and states that the lawyer did not like the looks of the map. They returned to Peoria and sent for the witness Boers at Lacon, a civil engineer, who, with appellants, the lawyer and two other witnesses experienced in tile digging, went upon the land the latter part of March, 1921, and

made various experiments in testing the soil upon the 342 acre tract. Boers testifies: "We went to the Burner tract, and under my direction, two tilers we had with us, the two Abbots, dug test holes under my direction over the tract to determine the nature of the soil, both the surface and subsoil." At that time they had a copy of the soil map and by these diggings they endeavored to verify the map. Most of the holes were dug on the west side. A few were dug on the east.

"We found that the black silt loam extended practically over the entire east half, and extended to a depth of two and a half and three feet, and was underlain with the clay subsoil. On the west half, in the north center and northwest portions thereof, we found a brown-gray silt loam on tight clay. This brown-gray silt loam over the tight clay, the surface soil varied in thickness from seven or eight inches to twelve or thirteen inches, the average being about ten to twelve inches. In most places it was underlaid to the depth of twenty inches by an intermediate soil, of a more or less plastic nature, a brownish-gray in color, and more or less impervious to water, though that to the depth of twenty inches or more, was underlaid with a tight clay, very plastic and impervious to water. This intermediate soil was not at all times present, in some instances the top soil at a depth of of ten or twelve inches verged immediately into the tight clay subsoil. This tight clay subsoil is a very plastic, viscous and impervious clay, having the appearance of unvulcanized rubber, as near as I can describe it, and when wet and broken apart, to be in horizontal layers."

"The farm is flat, with a slight fall to the southwest. From the nature of the soil and the nature of the subsoil and nearness to the surface to which the impervious clay lies, I would say it would be impracticable to tile it."

"Tile, to properly drain cultivated land, should lay between two and one-half and three feet below the surface. If tile were laid

in the Burner farm this way they would not work, or would work so slowly it would not be beneficial. In some years if the distribution of moisture were proper, fairly good crops might be raised, but as an ordinary thing, the top soil being so shallow, it becomes thoroughly saturated with the heavy spring rains, and being underlaid with the impervious strata, it keeps it wet for such a period that it does not drain out properly and does not warm up soon enough that seeding could be done as early as it could in better drained soil. Then, as the season progresses and as the top soil dries out, and the summer droughts come on, the plants would be required to draw their moisture from the lower depths and this same impervious strata would exist, and would hinder the capillary attraction. On the Burner farm the impervious clay would lay above the tile."

Boers further testifies that the east half of the farm is much better than the west half and that the west half of the tract would be worth about forty per cent as much as the east half.

Boers was on the tract again in October, 1921, with Appellant Stringer, the lawyer, and Evans, Wier and Snyder, who were witnesses from the State University. The consensus of this testimony is that there are about one hundred acres in the northwest part of the tract that is a shallow, light covered soil, eight, ten and twelve inches in thickness, resting upon a "tight" or impervious clay which prevents drainage, and in shortage of rainfall, drys out and the crops growing "burn up."

The soil map, made under the authority of the State, through the University, and in the hands of the farm advisor of Hancock County, was offered in evidence, and shows, as near as we can determine, sixty to seventy acres in the northwest part of the tract to be a "brown gray silt loam" or "tight clay" and that the balance of the tract is a "black silt loam on clay." It is conceded by all the testimony in this case by the witnesses who had any knowledge upon the subject, that there was some "spotted land" in the northwest

part of this tract where the subsoil was a more impervious clay, but there is a wide variation in the testimony as to the amount, its nature and its value.

On the 31st day of March, 1921, appellants served notice upon appellees which contained the following statements:

"For the purpose of inducing us to enter into the foregoing contract, you and your agent and agents represented and stated to us that the top soil was black loam for a depth of over two feet and the subsoil of said real estate was of a type highly desirable and well adapted to farming purposes, and particularly that the subsoil underlying said land was of yellow clay and porous so that the surface water would freely pass through it, and further stated that said sub-soil was first-class in respect to its drainage qualities.

"We relied upon said statements and each of them and believed them to be true and were induced thereby to enter into the contract aforesaid. We have now discovered that said statements and representations were false and untrue in this, that approximately one hundred acres of the West Quarter of said real estate has as a surface soil a loam of a light brown color of a depth of about eight inches, immediately below this is a gray clay stratum of plastic and impervious clay to a depth of about 18 or 20 inches, and underlying this there is a stratum of very plastic impervious clay of a thickness of 8 to 12 inches; that this clay is impervious to water and prevents the drainage of the surface water from said land and is so near the surface that it is not practical or expedient to tile said land by means of tile ditches and that there is no practical way of tiling and draining the said land, and because thereof the value of said land for farming purposes is greatly impaired and its fair cash market value greatly depreciated."

Appellants, therefore, in the notice elected to terminate and rescind the contract and demanded the repayment of the sum of

$31,800. At the time of serving this notice appellants delivered and turned over to appellees the new leases appellants had taken to the tract and advised Appellee Burner that they did not want the lands. Later, about June 16, 1921, appellants caused their contract of purchase with appellees, having a notice of rescission attached, to be recorded in the office of the Recorder of Deeds of Hancock County. The notice of rescission attached to the contract and recorded is as follows:

"To Whom it May Concern:

"Notice is hereby given that we and each of us have rescinded the foregoing contract on account of certain false and untrue statements and representations made to us, which induced us to enter into said contract; that because of said rescission we expect to and will start suit for the recovery of the $31,800 paid under said contract to said T. E. and D. B. Burner; and notice is hereby given that we claim a line against said premises to the extent of said sum of money.

"Dated this 16th day of June, A. D. 1921."

(Signed by appellants.)

Thereupon, on October 6, 1921, appellants filed in the Circuit Court of Hancock County a praecipe for summons in assumpsit and summons was issued returnable to the October Term, 1921, of said court. A declaration in assumpsit was filed in said cause on October 6, 1921, based upon special counts and the common counts. This cause stood upon the common law docket of the court until April 22, 1922, when, by order of court, the cause was transferred on motion of appellants to the chancery side of the court, and appellant presented a bill of complaint praying for equitable relief and praying summons issue for the additional defendants holding mortgage lien claims and appellees in this suit.

It is charged in the bill that the representations made were: "That all of said land has a surface soil composed of black loam to the depth of about two feet, and that underlying this for several feet was a yellow, double-jointed clay subsoil, which was pervious to water and of such a character as to permit the free and uninterrupted passage and absorption of water falling upon the surface and of such a character as to permit water by capillary attraction to pass freely from the subsoil to the surface." This charge as to representations was made in one count of the declaration in the common law suit. We set it out as it contains phrases not previously used by appellants such as "double-jointed," a term enigmatical to many witnesses in the case, and we have not been able to find the term in the dictionaries. In fact, but one witness of appellees' forty-five witnesses had ever heard of the term or was able to define a "double jointed" clay subsoil. It is noticeable, also that appellants did not use the term in the notice of appellees, and the term used is peculiar in this record.

Appellees produced over forty-five witnesses. Appellee Burner and Jolinson denied emphatically that either of them had used the terms and language ascribed to them in certain respects as testified to by appellants and Hamm, or that they or either of them had made any statement about the tract that appellants could not see for themselves. Burner's description of the amount of tile on the farm, its location, the slope of the land and the out-let to the southwest, was all borne out by the facts as proven. But some of appellants' witnesses from the University testified that land could not be drained where "tight clay" was present, and that statement, from all the testimony, as an academic question might be true in certain isolated and extreme cases; but, from the testimony, it is not ordinarily true in practical farm drainage, as many of appellees' witnesses

testified. Just how much "tight clay" or brown gray silt loam there was on the west quarter section, it was difficult to determine. Boers and his assistants bored holes at various places with no particular system and came to the conclusion there was about one hundred acres of so-called inferior land. Stringer testified that he had never heard of "tight clay" lands. Burner testified that he had never heard of a "double-jointed yellow clay" land and each may have testified truthfully. Appellee caused a survey to be made of the entire west quarter section of the land and a hole to be dug every two hundred feet in each direction. William Jeffrie Horney, aged seventy-five years, a farmer and surveyor, who had had experience in farm drainage and given a good deal of attention to the nature of soils and the effect of tiling, testified for appellees:

"I did some surveying for Burner on the Burner farm; dug holes on the farm in company with Donahue, a soil expert from Macomb. This was done July last, from the 4th to the 9th; dug a hole every two hundred feet over the west quarter, beginning at the southwest corner; used thirteen stakes in crossing the quarter section. Then we went north two hundred feet from that and back on another line, until we set a stake every two hundred feet over that whole quarter of land. Dillon, Cook and McKee dug the holes. After the holes were dug, in company with four or five other men, Cook, McKee, my grandson, Paul Horney, and myself and Fisher, and a soil expert from Macomb, investigated the soil; took a tile spade and sliced down the side of that hole to the three foot depth, laid out the slice so that we could measure the soil and the sub-surface soil and the sub-soil, and pass on its quality. My grand-son, Paul Horney, kept the record after we passed on it and agreed on what we could. This record was turned over to T. E. Burner at the close of the investigation.

"There were two distinct ponds. Some of the holes came in the ponds. One had two. The soil in the north pond was rusty and was jointed, but showed rusty streaks through it like water had laid on it; have drained ponds like that successfully.

"The soil in the south pond was the same as the other; think it would tile drain; know about light or white spots in land in Hancock County. The soil is harder to dig through than black soil.

"The last hole was near the northwest corner of the west forty. There was more dark soil toward that corner; put down an extra hole at the northwest corner; saw a quarter of an acre of light land up near the northwest corner. That light soil will not drain as well as the other land; think the Burner farm can be tiled.

Q. "Did any of these holes go down in any of these white spots on this quarter?

A. "Yes, there was several holes that the soil was tighter than at other places. Now, I don't remember; it seems to me No. 20 or 21, that is east on the first row, was about the worst of any I saw. That is the hardest. * * * That is my recollection, just from memory. I know I found that to be tolerable hard soil."

You can't tell the white spot as well when there is corn growing on it; "couldn't see it for the corn." That soil was tighter and harder than in the ponds. Sometimes the white soil was in a spot and sometimes in a streak. The drainage of the east half of the Sinele eighty is toward the east and south. The plat shows two distinct drains, outlets, near the southwest corner of the west quarter. There is a well defined fall of the east part of this farm to a drain there on the south line. There had been a heavy rain and they could tell the drainage of the land by the way the water had flowed on the surface. The white spot comes in between stations 157 and 158 just south. Between holes 49 and 50 there is a windmill. The circle around station 85 represents a pond. The circle near 127, 134 and 135 is another pond. Nothing growing in the pond when he was there.

The arrows show the natural flow of the water. There is sufficient fall to drain the farm. The lines give the direction and

the figures give the rise in feet. Most every section has a fall, and when they are added together there is a good fall on every line.

There is enough fall on the farm to successfully drain it; thinks the soil will drain on that farm.

Q. "Did you find any hardpan in there?

A. "No, sir, not any hardpan that I call hardpan. Of course, there was a close, tight soil in a few spots that won't drain very easily, won't flow freely through it, but you find it everywhere over this county and even in other counties.

Q. "You may state whether or not you have found such spots in practically every farm you drained in this county?

A. "In many of them, yes, sir."

Didn't dig on the east quarter. Most of the west quarter is a brown soil "with occasionally a white or light spot."

"I have a recollection that there was no bad soil except as I tell you, occasionally, probably twenty holes on that whole farm that I considered pretty tight soil, hard to drain.

Q. "Yes, sir, take hole 21 and describe it from the surface down three feet.

A. "Well, it had apparently a good little bit of soil on top, not deep.

Q. "About six inches?

A. "Yes, sir, and a subsoil or sub-surface soil that grew into a whiter, lighter color. While this showed on top, it didn't show as plain as it did below the surface, because it had been mixed in the top by plowing and farming. Probably some day it had shown whiter.

Q. "How deep would that be, Mr. Horney, the sub-surface?

A. "As near as I can remember, probably six or eight or ten inches, may be nearly to the bottom of the hole, of the light colored soil.

Q. "That would be this whitish-looking, stickier soil?

A. "Yes, probably the same as you have there. Yes, it probably does. It was as light as that.

Q. "A kind of sticky clay?

A. "No, not necessarily so sticky, but it wasn't a jointed clay, exactly, but it was porous."

It is better to take a testing of soil with a spade rather than with auger. The auger pulls the soil together. An auger compresses the soil. It is better to lay it out with a spade.

Joseph McKee, who assisted the witness Horney in surveying the tract, had spent a life time draining land and had placed three hundred and fifty miles of tile in Hancock County. He testified: "I know the Burner half section of land. I was on that land during the month of July, 1923. I dug test holes all over the quarter—every two hundred feet. That was the northwest quarter of the section—the west half of the half section. I dug most of the holes myself. They were dug by stakes set by W. Jeff Horney. I was there when he set them. The stakes were numbered. Stake No. 1 began at the southwest corner of the quarter. From here they ran east. The last number east on the first row was No. 13. Then there was another row two hundred feet north, then west again. This was continued back and forth over the quarter, up to 169 holes. The last hole was in the northwest corner of the quarter—or rather it should be the northeast corner—the 169th hole. I put down holes near these stakes. They were practically all three feet deep. I probably dug a hundred of them. I observed the kind and character of the soil I was digging in. I examined the soil in all the holes. We dug down by the side of the hole with a spade. We put down additional holes in the northwest corner. We were looking to see if we could find any hardpan. We put a hole a little northwest of the last stake in the northwest corner. I

heard about it being a bad place; that it was the worst place on the farm. I put the hole down three feet. That hole was clay loam; it would drain. The additional hole near the northwest corner was practically the same thing as the stake; it would tile drain. There was a hole came in each of the ponds. It was a kind of a brown loam, and a granular clay subsoil; it would tile drain. I did not find any hardpan on the west half of the Burner land. I am familiar with hardpan.

"A day or two before, or at least a little before, I put down these 169 holes I put down some other holes promiscuously on the land. One was about station 20 on defendant's exhibit 3. There was some dispute about the ground being hardpan, so I dug two holes there practically and left a partition between, and poured a couple of buckets of water in there to see what it would do and the water seeped through from one hole to the other. The partition was six inches thick between the holes and the holes about three feet deep. The soil there was porous. This was a white spot where I put these holes. The soil was porous. I found no soil on the Burner land tighter than I found at this point, No. 20, where I poured the water in the holes. I think that there is plenty of fall on the land to drain it. I did not help Mr. Horney in this getting of the levels, but I had taken levels myself once before over the same farm.

Q. "Now, Mr. McKee, I want to ask you whether or not, in your opinion, from your experience as a drainage contractor and tiling different farms, and from what you saw of the soil on this farm, on the west half of the Burner farm, it is practical to tile drain that quarter section of land and all of it?

A. "It is, yes, sir.

Q. "And will or not, each and every part of that quarter section of land successfully tile drain?

A. "Yes, sir."

"I have had experience in tiling farms that have white spots on them, and on places such as were found on the ponds on this quarter. The tile laid there makes it the best part of the farm. I have laid tile in ponds similar to these. I do not find any tight subsoil on this farm. I did not find any land in this quarter section that you would call plastic clay or any white spots which would prevent it being successfully tiled. I have had experience in determining the character of the soil in putting down holes on land. The only accurate way is with a spade. You can't do anything with a two-inch auger. You bore down in the soil and that destroys the pores of the clay, works it up together and you can't tell whether it will drain or not. A two-inch auger just putties it all together and mixes it all up. You can not tell anything about the soil after it is baked hard—after it is mixed together that way, nor can you tell immediately after it is taken out. There was corn growing right up to the pond—that is, the north pond. I observed the crops on the place last summer. They were good when I was there. You couldn't tell any difference in the crops on the light places and on the rest of the farm.

Q. "Now, I will ask you how this land will compare as to tile drainage with the average land up through that section, Mr. McKee, as to whether it will drain as well as the average land up through there?

A. "Yes, sir, it will.

"I have had occasion in laying 350 miles of tile in Hancock County to observe the effect on land similar to the Burner land, where tile is laid through these spots, and through ponds in soil similar to the Burner land. We have these spots in almost any quarter in Hancock County. There is no quarter where you can't find it. This is as good a quarter as there is in the county."

Albert O. Behnke testified that he was a farmer and stock feeder and says in the latter part of June or the first of July he sold what has been mentioned in this record as the Behnke farm at $265 per acre. He says he does not know what it sold for when sold the second time but he says that the third time it was sold for $325 per acre. These sales were made in 1919 and 1920 and as already shown by other witnesses the Behnke land was not as good land as the Burner land. It was purchased at $325 per acre by Grover Barnard who had formerly lived in that vicinity. This witness, Behnke, says that he had known the Burner farm for fifty years; that he had always considered it a good farm; that there was always a good crop on it.

This testimony was corroborated by numerous witnesses, men of practical knowledge of affairs, and in such numbers that this court is impressed that the condition of the soil in the part of the tract in question is not a hardpan or impervious clay underlying any considerable portion of the tract, but that it is spotted, there being in places light spots or streaks where the surface soil would not extend so deep and be underlaid with a harder clay, more difficult to drain, but still porous. These spots and streaks were found on nearly every farm in Hancock County and as to the amount of this land on appellees' tract, it is practically impossible to determine; one witness testified not over two acres. Of actual land underlaid by this clay, probably there was not to exceed twenty acres. There may have been more and it is quite possible there was less. There was testimony tending to show that one could see and observe this light soil by going over it, and Appellant Stringer's testimony corroborates this theory in the importance he imputes to the claim that Johnson and Hamm would never take him over this part of the tract. Johnson testifies that they were over this part of the tract, and that Appellant

Stringer saw the spots and that they discussed them.

The testimony of over thirty witnesses was undisputed that in June, 1920, similar tracts of land in Hancock County were selling for three hundred dollars per acre. Only one witness placed a lower valuation upon the tract—$275 per acre—while a few testified that the price had gone as high as $325 per acre. This testimony was competent as bearing upon the question of motive that appellees might have to commit a fraud. Appellees had purchased the lands in the spring of 1919 at $220 per acre. The increase in value is not remarkable under the testimony in this case, and to those who remember the "booming" times. There are certain features of this case which are remarkable, some of which have been pointed out and do not need further amplification. Appellant Stringer testified that he purchased these lands for a home, as corroborative, we take it, that he relied upon appellees' representations as to the soil. If he testified truly he made a very improvident bargain, at fifty-eight years of age to purchase a tract of land encumbered by a mortgage for forty thousand dollars and without the means to pay for the equity, and with no means with which to tile, drain or make repairs upon the dilapidated buildings and fences. The natural thing for one desiring a home, in the opinion of this court, would be to first find a market for the one which he has and, at least, before he purchases to provide himself with means sufficient to pay for the equity in the roof which he plans to cover him. This appellant did not do. If appellant were speculating in land, and purchased this tract for a resale, at a profit, which he expected, this court could more readily give credence to Hamm's testimony that Appellant Stringer "was a good judge of dirt." The testimony of Hamm is not impressive in this record. At the time Hamm was advising the Stringers to see a lawyer and assisting in laying the foundations of this litigation,

he had in his possession a good remunerative commission paid by appellants for getting them into this difficulty. The record does not show that Hamm has ever offered to return any part of this commission to appellants; neither does it show that Hamm was deceived or misled by any of the false representations charged to Johnson or Appellee Burner. In fact, Stringer substantially charges Hamm with aiding Johnson in keeping appellants away from the west part of the tract. Appellees' conduct on March 1, 1921, in offering to extend the time of payment and delivering the possession of the lands to appellants, as appellees had done, hardly seems in accord with a fraudulent transaction.

The Master in Chancery found that the testimony did not establish that appellees or their agents made the false representations upon which appellants relied, charged in the bill of complaint, and the chancellor has approved that finding, upon which a decree has been entered. The burden of proof to establish these charges is upon appellants. **Hungerford v. Behrens,** 308 Ill. 414. The law applicable to this case has been aptly and forcibly laid down in **Crocker v Manley,** 164 Ill. 296, where it is held:

"In**Farmsworth v Duffner, supra,** which was a bill for the rescission of a contract of purchase and to recover the money paid on the contract on the ground that it was entered into through false and fraudulent representations, in the decision of the case it was said: 'Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities he will not be heard to say that he has been deceived by the vendor's misrepresentations.' It is there, among other things, also said: 'In **Ludington v. Renick,** 7 W. Va. 273, it was held that 'a party seeking the rescission of a contract on the ground of misrepresentation must establish the

same by clear and irrefragable evidence; and if it appears that he has resorted to the proper means of verification, so as to show that he in fact relied upon his own inquiries, or if the means of investigation and verification were at hand and his attention drawn to them, relief will be denied.' In the case of **Attwood v. Small,** decided by the House of Lords, and reported in 6 Cl. & Fin. 232, 233, it was held that 'if a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or to his agents, he cannot be heard to say he was deceived by the vendor's representations.' And in 2 Pomeroy's Equity Jurisprudence (sec. 892) it is declared that a party is not justified in relying upon representations made to him: '(1) When, before entering into the contract or other transaction, he actually resorts to the proper means of ascertaining the truth and verifying the statement; (2) when, having the opportunity of making such examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence; (3) when the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by both parties.' But if the neglect to make reasonable examinations would preclude a party from rescinding a contract on the ground of false and fraudulent representations, **a fortiori** is he precluded when it appears that he did make such examination and relied upon the evidences obtained by such examination, and not upon the representations."

In this case there is nothing to show that Appellee D. L. Burner made any representations or knew anything about the land or soil or had or appointed any agent to act for her, other than O'Harra through the power of attorney and the terms of the contract therein recited. Nothing in the record indicates that Appellee T. E. Burner had any more knowledge about the land or soil than appellants had. Certainly it is not established by "clear and

irrefragable evidence," and this court, from the record, is led to the irresistable conclusion that this litigation would never have been in the courts had not the panic in land values and business occurred in the fall and winter of 1920 and 1921. We can not say that the finding of the Master and Chancellor as to the false representations claimed to have been made, is against the weight of the testimony. We are satisfied that it accords with the testimony. Other questions are raised in the case but this finding makes it unnecessary to consider any of them, except one.

The bill prayed that appellants' claim for moneys paid upon the contract be established as a prior lien to that of the second mortgage upon the lands, and the decree dismissing appellants' bill for want of equity apparently is **res adjudicata** of that question against appellants. Appellants have assigned error that the decree is contrary to equity and good conscience and in not finding that the lien of appellants for the amount paid on the contract is a prior lien to that of the second mortgage.

Appellants and appellees have presented this cause to a court of equity without presenting the true relationship that these parties bear to each other under the terms of the contract, in a court of equity. Under the decree of the Circuit Court and the finding in this court appellants are denied the right to rescind said contract, and it is still in force. Appellees have never forfeited the contract or brought proceedings to recover the balance due upon the contract, or to foreclose against the lands. Appellees are in the position of mortgagees in posession. (**Lewis v Shearer,** 189 Ill. 186; **Rhodes v Meredith,** 260 Ill. 143; **Miedema v Wormhoudt,** 288 Ill. 537; **Ward v Williams,** 282 Ill. 641; **Knights v Knights,** 300 Ill. 618.)

In **Lewis v Shearer, supra,** it was held: "The appellant contends that Rudolph Topsico having failed to pay the purchase money when due by virtue of the conveyance of three of the heirs of Frank M. Tatum to him, the bond for a deed was forfeited and he became

invested with the absolute title to the undivided three-fourths part of the land, disencumbered of any right, title or interest therein of Rudolph Topsico and John A. Shearer. In a court of equity such contention cannot be sustained. In equity the land upon the execution of the bond and notes became the property of Topsico and the purchase money that of Tatum, and the transaction will be considered in the nature of a mortgage, and treated as though a conveyance had been made to the vendee and a re-conveyance taken back by way of a mortgage when may be sold and assigned, and the assignee may enforce such lien in equity. (**Lombard v. Chicago Sinai Congregation,** 64 Ill. 477; **Wright v. Troutman,** 81 id. 374; **Hutchinson v. Crane,** 100 id. 269; **Church v. Smith,** 39 Wis. 492; **Conner v. Banks,** 18 Ala. 42 (52 Am. Dec. 209); **Gessner v. Palmater,** 13 L. R. A. 187.)"

The contract between the parties was of record and was an instrument relating to the title to the land or some interest therein, at the time the second mortgage was given, and the notice of lien or rescission "being an instrument not entitled to be recorded," as contended by appellants (**St. John v. Conger,** 40 Ill. 535) may be disregarded as notice to the holders of the second mortgage indebtedness. The interest of the parties in said lands, under the terms of the contract, not having been litigated in this suit, it is the opinion of this court that the decree of the Circuit Court of Hancock County as to appellants' right to rescind or cancel the contract, should be affirmed, but as to the rights of the parties, appellants and appellees, under the terms of the contract, the decree of the lower court should be modified to show that appellants' bill of complaint was dismissed without prejudice.

Affirmed in part and Decree Modified.

STATE OF ILLINOIS.

APPELLATE COURT

4TH. DISTRICT.

OCTOBER TERM, A.D. 1926.

Term No. 15. AG. NO. 16.

JENNIE ECKMAN, Appellee,	:	APPEAL FROM
VS.	:	MADISON
JOHN WILDT, Appellant.	:	COUNTY COURT.

Barry, P.J. - Appellee is a real estate broker and was employed by appellant to find a purchaser for a house and lot he wished to sell. While negotiations were pending she showed the property to a Mr. Dively, who was very much interested and said he wanted the property or one like it. The party who had previously looked at the property decided to take it and the deal was closed. Appellee told appellant that Mr. Dively wanted to buy a property like the one she had just sold. She says that appellant then told her that if she got him a contract for another house like the one just sold he would see that she got her commission; that Dively could select any vacant lot that he wanted; that he made a selection; that appellant bought the lot, built the house thereon for Dively and sold the premises to him for $5,000.00.

Appellant testified that appellee talked to him about the house before he bought the vacant lot that she had for sale; that appellee told him that if she made the deal with Dively he must pay her a commission; that he told her he would make the

price high enough so that she could get a commission of 5%; that he never knew Dively and his wife until appellee introduced him to them; that when he went to see the Divelys they knew from appellee that he bought the lot for $1350.00 and was to put up a house for them for $3650.00. The price was satisfactory to appellant and he sold the house and lot to Dively for $5,000.00. Appellee was not present at the final consummation of the sale. She received a commission from the seller of the vacant lot based on the purchase price of the lot and sued appellant for her commission on the value of the house, $3650.00. She recovered a verdict and judgment for $182.50.

We are of the opinion that even though appellant was not present when the sale was finally consummated, yet she was the efficient and procuring cause of the sale and is entitled to her commission, Ellis vs. Dunsworth, 49 App. 187; Shannon vs. Potts, 117 App. 80; Cowan vs. Day, 156 App. 105; Geer vs. Chapin, 163 App. 654. Acting as reasonable men the jury could not have reached a different verdict. No reversible error having been pointed out, the judgment is affirmed.

AFFIRMED.

Not to be reported

[illegible] high enough so that she could get a commission of 5%; [illegible] he never knew Dively and his wife until appellee introduced [illegible]im to them; that when he went to see the Divelys they knew [illegible] appellee that he bought the lot for $1350.00 and was to put [illegible] a house for them for $5550.00. The price was satisfactory [illegible] appellant and he sold the house and lot to Dively for $6,000.00. [illegible]llee was not present at the final consummation of the sale. [illegible] received a commission from the seller of the vacant lot based [illegible] the purchase price of the lot and sued appellant for her [illegible]ssion on the value of the house, $5550.00. She recovered [illegible] and judgment for $128.50.

We are of the opinion that even though appellant [illegible] present when the sale was finally consummated, yet [illegible] efficient and procuring cause of the sale and is en[illegible] to her commission. Mills vs. Dunsworth, 49 App. 127; [illegible]mmon vs. Potts, 117 App. 83; Gowen vs. Day, 186 App. 108; [illegible]er vs. Chapin, 165 App. 664. Acting as reasonable men the [illegible] could not have reached a different verdict. No reversible [illegible]

STATE OF ILLINOIS.

APPELLATE COURT

4TH DISTRICT.

OCTOBER TERM, A. D. 1926.

TERM NO. 25 AG. NO. 10.

JOE A. HUBELE, Appellee,	:	APPEAL FROM
VS.	:	WHITE CIRCUIT
LOUISVILLE & NASHVILLE R. R. CO., Appellant.	:	COURT.

Barry, P. J. - Appellee recovered a verdict and judgment under a declaration charging that on August 28, 1925, appellant had been operating a certain line of railroad for more than six months; that it was the duty of appellant to maintain fences along its tracks, and gates or bars at farm crossings, suitable and sufficient to prevent stock from getting on the railroad; that appellee had thirteen head of cattle in his pasture; that they escaped therefrom and went into his neighbor's field adjacent to appellant's railroad; that appellant had constructed a farm crossing in said latter field and had placed a gate in its fence so as to allow the passage of stock across its tracks; that appellant suffered said gate to become in a state of disrepair, so that it was no longer in a safe condition to turn cattle and prevent them getting upon the railroad track; that by reason of the condition of the said gate, appellee's said cattle passed

out of his neighbor's field and went upon the railroad track and were struck by appellant's engine and train of cars; that ten of them were thereby killed and three were seriously injured, etc.

Appellant's main contention is that the court should have directed a verdict in its favor. The undisputed evidence is that for two or three years before the accident the posts were spread and the gate could not be latched; that a wire was used to fasten it; that wire fastenings frequently break; that the gate had come open at times. Appellee testified, without objection, that he and appellant's section men were at the scene of the accident soon after the train struck the cattle; that two of the men went west and one went east along the track to find where the cattle got on the right of way, and that when they returned the section foreman told him that the cattle came through the gate in question. He also testified that the cattle got out of his own field through a defective fence into his neighbor's field, and from there they passed through the gate on to the railroad right of way. No one testified as to the condition of the gate immediately before or immediately after the accident. One witness testified that he saw the gate a few days before the accident; that he went through it; that the posts had spread and it could not be latched; that there was a wire to fasten it, and that he fastened it with the wire at that time. He also testified, without objection, that when he next saw the gate after the accident, it had been fixed up. Appellant called but one witness, one of the section men, but not the foreman, who said that he walked the track on the morning of August 27th, and observed that the gate was closed.

The statute required appellant to put in gates at this farm crossing. The gates are a part of the fence, and the duty to keep the fences in repair includes the duty to keep the gates safe and securely closed, so as to afford equal

[illegible] of the [illegible]'s field and went upon the railroad track and were struck by appellant's engine and train of cars; that [illegible] of them were [illegible] killed and others were [illegible] injured, etc.

Appellant's main contention is that the court should have directed a verdict in his favor. The undisputed evidence is that two or three years before the accident the posts were opened and the gate could not be latched; that a wire was used to fasten it; that wire fastenings frequently broke; that the gate had been open at times. Appellee testified, without objection, that he had appellant's section men open at the crossing at the accident with their tools during the night; that one of the men said that he went that direction that night to find their tools; that he had left the tools at the place of the accident; that when they went back the gate was open; that when they reached the wagon road they found the tools in the wagon's field, and from there they passed through the gate on to the railroad right of way. No one testified as to the condition of the gate immediately before or immediately after the accident. One witness testified that he saw the gate a few days before the accident; that he was [illegible]; that the gate was open and appeared well [illegible]; that it was latched; that there was no [illegible] in it; that it was [illegible]; that the gate was [illegible] and [illegible] the road; that the gate was closed.

The plaintiff's requested instruction is not in proper form and [illegible]. The [illegible] are a part of the [illegible], and the duty to keep the fences in proper condition [illegible] the duty to keep the gates safe and securely closed, so as to afford proper

protection from stock getting upon the tracks at such places as at other points, C. & N. W. R. R. Co., vs. Harris, 54 Ill. 528. In that case the gate had been left open for a week and the railroad company knew it was open. Where the fastening consisted of a chain and hook, which was fairly good, but the gate would play back and forth with nothing but the chain and hook to hold it, the court said:- "In this condition it was subject to be opened by the action of the wind or by stock rubbing against it, C. & A. R. R. Co., vs. Morton, 55 App. 144. In that case there was no direct evidence that the gate was opened by the action of the wind or by the stock, but the court considered it a fair inference that it was opened in one of those ways. Where the question was as to whether there was a sufficient fastening for the gate and there was evidence to the effect that the gate was so constructed that but little force was required to open it, the court said that in all probability the horses opened it by rubbing and pushing against it, C. B. & Q. R.R.Co., vs. Finch, 42 App. 90.

The testimony of appellee that the section foreman told him that the cattle came through the gate on to the railroad track was hearsay and incompetent. Had it been objected to the court, no doubt, would have excluded it. The evidence that the gate was repaired after the accident was incompetent but it was not objected to, Howe vs. Medaris, 183 Ill. 288. Litigants are in no position to complain of incompetent evidence where they allow it to go to the jury without objection.

Where evidence is hearsay and incompetent but is admitted without objection, it is to be considered and given its natural probative effect as if it were in law admissible, Ascher Bros. vs. Industrial Commission, 311 Ill. 258. The effect, ordinarily, of evidence of repairs having been made after an accident, is to operate as an admission of negligence, City of Taylorville vs. Stafford, 196 Ill. 288-291. Such evidence is apt to be interpreted by a jury as an admission of negligence, Hodges vs. Percival, 132 Ill. 53-56. If a party is content to

let improper evidence go to the jury, without objection, he cannot complain if the jury has considered it and given it its natural probative effect.

Appellant insists that its peremptory instruction should have been given because appellee was guilty of contributory negligence in failing to maintain his own fence in such manner as to prevent the escape of his cattle into the field of his neighbor. That contention is without merit, C. & N. W. R.R.Co., vs. Harris, supra; I. C. R.R.Co., vs. Arnold, 47 Ill. 173.

In view of the facts that the posts were spread and the gate could not be latched; that such was the condition for two or three years; that a wire was used to fasten the gate; that wire fastenings frequently break; that the gate had come open at times; that appellant repaired it soon after the accident and that appellant's section foreman examined the gate a few minutes after the accident and told appellee that the cattle came through the gate, we are of the opinion that the jury might reasonably infer that because of the insufficiency of the fastening the gate came open, or that it was so insecurely fastened that the cattle opened it by rubbing and pushing against it. That being true the court did not err in refusing to direct a verdict in favor of appellant. We would not be warranted in holding that the verdict is so manifestly against the weight of the evidence that it should be set aside. No reversible error having been pointed out, the judgment is affirmed.

AFFIRMED.

Not to be reported.

5991a

STATE OF ILLINOIS.

APPELLATE COURT

4TH. DISTRICT.

OCTOBER TERM, A. D. 1926.

Term No. 30. AG. NO. 22.

ROY MODLIN, Appellee,	:	APPEAL FROM
VS.	:	MARION
ALVA ARROWSMITH, Admr. etc., Appellant.	:	CIRCUIT COURT.

Barry, P. J. - Appellant's intestate was a widower, and all of his children were married. During the last nine months of his life he was cared for in the home of appellee who is the husband of one of the daughters. Appellee filed a claim against the estate for services rendered in caring for the deceased and recovered a verdict and judgment for $893.00.

Deceased first went to appellee's home in November 1921, under an agreement by which appellee was to receive $10.00 per week for his board and care. He remained with appellee until June 4, 1923, and appellee was paid in full for that period. From June 4, 1923 until August 3, 1924, deceased was cared for by Mrs. Dedman. On the latter date he was brought back to appellee's home where he remained and was cared for until his death on April 21, 1925.

The undisputed evidence shows that all parties knew and understood that appellee was to be paid for his services. The only controversy was in regard to whether he should receive a reasonable compensation or $10.00 per week. At the time deceased

STATE OF ILLINOIS.

APPELLATE COURT

4TH. DISTRICT.

OCTOBER TERM, A. D. 1926.

Appellee,	:	APPEAL FROM
	:	MARION
vs. Admr. etc.,	:	CIRCUIT COURT.
Appellant.	:	

24 I.A. 550

P. 3. - Appellant's intestate was a widower, and all of his children were married. During the last nine months of his life he had stayed for in the home of appellee who is the husband of one of his daughters. Appellee filed a claim against the estate of the deceased. The administrator filed a plea of the statute of limitations. The deceased had recovered a verdict and judgment for $800.00.

Deceased first went to appellee's home in November 1922, under an agreement by which appellee was to receive $10.00 per week for his board and care. He remained with appellee until June 4, 1923, and appellee was paid in full for that period. From June 4, 1923 until August 3, 1924, deceased was cared for by Mrs. Hudson. On the latter date he was brought back to appellee's home where he remained and was cared for until his death on April 21, 1925.

The undisputed evidence shows that all parties knew and understood that appellee was to be paid for his services. The only controversy was in regard to whether he should receive a reasonable compensation or $10.00 per week. At the time deceased

was brought back to appellee's home in August 1924, nothing was said as to what his compensation should be. There is evidence tending to show that he admitted that he was to get $10.00 per week. The evidence on the part of appellee is to the effect that the condition of the deceased was much worse after August 1924; that he was confined to his bed practically all the time and had to be cared for like a little child. That his clothing and the bed-clothes had to be changed several times a day; that he had bed-sores and required much care and attention. No fault was found with the character of the services rendered. In the state of the proof we would not be warranted in holding that the verdict is so manifestly against the weight of the evidence that it should be set aside.

Appellant contends that the Court committed reversible error in permitting three witnesses to testify as to what would be a reasonable compensation for appellee's services before a proper foundation was laid. The record discloses that one of these witnesses was permitted to answer without an objection being made to the question. It also shows that when the question was asked another witness appellant made a general objection which was overruled. The law is well settled that when an objection to the admission of evidence is of such a character that it may be removed by further proof it must be stated specifically at the time the evidence is offered. A general objection will not reach an objection that, presumably , , might have been obviated if specifically pointed out.

There was no specific objection except in the case of one of the witnesses. Other witnesses testified as to what would be a reasonable compensation without any objection being interposed. There was no reversible error in the rulings of the Court in the admission of evidence.

Appellant contends that the Court committed reversible error in the giving of appellee's third instruction. It is argued

[illegible] by appellant's lawyer in August 1964, relating was [illegible] as to what his compensation should be. There is evidence [illegible] in close [illegible] in which he was in [illegible] per [illegible]. The evidence on the part of appellee is to the effect that [illegible] of the deceased was much worse after [illegible] and he was confined to his bed practically all the time and was [illegible] be cared for like a little child. That his clothing and the bed-clothes had to be changed several times a day; that he had bed-sores and required care and attention. No fault was found with the operation of the decedent herself. In the words of the court we would not be warranted in holding that the testimony is so unfavorably against the weight of the evidence that it should be not [illegible].

Appellant contends that the Trial Court's [illegible] error in permitting these witnesses to testify as to what would be a reasonable compensation for appellee's services before a proper foundation was laid. The record discloses that one of these witnesses was permitted to answer without an objection being made to the question. It also shows that when the question was asked another witness appellee made a general objection which was overruled. The law is well settled that when an objection to the admission of evidence is of such a character that it may be remedied by [illegible] it must be stated specifically at the time the evidence is offered. A general objection will not reach an objection that, properly, it may have been obviated if specifically stated [illegible].

There was no specific objection raised in the case [illegible] of the witnesses. Many witnesses testified as to what would be a reasonable compensation without any objection being interposed. There was no error in the rulings of the Court in the admission of evidence.

Appellant contends that the Court committed reversible error in the giving of appellee's third instruction. It is argued

that the instruction is erroneous because it fails to require the jury to find from the evidence what was a reasonable and customary compensation. While the instruction is subject to criticism in that regard, yet in view of the fact that the issue was simple and easily understood, we are of the opinion that it was not reversible error, King vs. Swanson, 216 App. 294. It is quite evident that the jury acted upon the evidence and were not misled by this instruction. The evidence on the part of appellant was to the effect that a reasonable compensation for appellee would be $10.00 per week, while that on the part of appellee was as high as $42.00 per week. The jury allowed appellee about $25.00 per week.

It is argued that the said instruction is erroneous because it told the jury that damages were to be awarded unless they further believed there was a contract for such services, and in that event they should allow appellee such sum as they should find had accrued to him under the contract. That part of the instruction is not accurate but we cannot see how the jury could have been misled. Appellee, of course, could not recover unless there was a contract express or implied. Appellant tried the case on the theory that there was an express contract. The instruction simply means that if there was no express contract then appellee would be entitled to recover the reasonable value of his services. We are of the opinion that the giving of this instruction was not reversible error in this case. We find no error in the ruling of the Court on any of the other instructions. If the condition of the deceased was such as was described by the witnesses for appellee, we would not be warranted in holding that the verdict is excessive. The jury evidently concluded that appellee was not entitled to as much as he claimed, but that he was entitled to more than appellant admitted he should have. We cannot say that the verdict is excessive. The judgment is affirmed.

Not to be reported

AFFIRMED.

Not to be reported

5792

STATE OF ILLINOIS

APPELLATE COURT

4TH. DISTRICT.

OCTOBER TERM, A. D. 1926.

TERM NO. 41. AG. NO. 28.

244 I.A. 680

S. F. CATES, Appellee,	:	APPEAL FROM
VS.	:	CITY COURT OF
ROLLA M. TREECE, Appellant.	:	WEST FRANKFORT, Ill.

Barry, P. J. - Appellee recovered a verdict and judgment for $105.69. He claims that the judgment is based upon two items, one of $75.00, and the other $30.69. He testified that he gave appellee a note which included $120.00 for insurance on certain premises for a period of five years and that he afterwards paid the note to appellant; that appellant only procured insurance on the property for one year and that by reason thereof appellant owes him $75.00. His testimony shows that he never saw the insurance policy and that all he knows about it having been written for one year is what some one else told him.

As to the item of $30.69 appellee contends that appellant charged him with that amount twice and had given him credit but once. The record discloses that these parties had a settlement in 1922 and the sheet showing the balance then

due was offered in evidence and in regard to that there seems to be no dispute. The sheet shows that appellee was given credit for $30.69. He makes no claim that he should not have been charged with that amount once. If he was charged with it twice and credited once and gave his note for the balance due, including $30.69 we are at a loss to understand why he should now be permitted to recover that amount from appellant.

From a careful consideration of all the evidence in the case we are of the opinion that if appellant is in any way indebted to appellee for either of the amounts aforesaid, he has failed to furnish sufficient proof to support the judgment. The verdict and judgment are contrary to the evidence and the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported

5 1/2 2a

STATE OF ILLINOIS.

APPELLATE COURT

4TH. DISTRICT.

OCTOBER TERM, A. D. 1926.

TERM NO. 43. AG. NO. 40.

ANTONIA SHIMKUS, Appellant,	:	APPEAL FROM
VS.	:	CITY COURT OF
STANDARD OIL CO., Appellee.	:	EAST ST. LOUIS.

BARRY, P. J. - Appellant brought this suit to recover damages for injuries alleged to have been caused when she was struck by one of appellee's trucks. She averred, in her declaration, that a servant of appellee was driving a certain motor-truck on Collinsville Avenue, in East St. Louis, Illinois, at the intersection of said avenue and Illinois Avenue; that while appellant was walking northward and across the said Illinois Avenue at said intersection, and at the place where pedestrians were properly walking across that street, appellee so carelessly, negligently and improperly drove and managed its said truck in that it made an abrupt turn eastward into Illinois Avenue, and as a result of such carelessness and negligence, and without any warning to the plaintiff, appellee then and there drove its said truck into and caused the same to strike the plaintiff with great force and violence, etc. There was a plea of the general issue and a verdict and judgment in favor of appellee.

Appellant argues that her counsel were denied the right of making a fair statement to the jury of the issues in the case, the facts they expected to prove and the principles of law applicable thereto. That argument is based solely upon the fact that when one of her attorneys was making the opening statement to the jury and was about to read the declaration, the Court said:- "Make the opening statement to the jury, which must be brief and concise. No reading of the pleadings." It will be observed that her counsel were not denied the right of making a fair statement to the jury of the issues in the case, or the facts they expected to prove, or the principles of law applicable thereto. The Court simply suggested to counsel that he should not read the pleadings. We take it that counsel was at liberty to inform the jury as to the issues in the case, as to what he expected to prove and the law applicable thereto.

At the close of the evidence appears the following:- "The Court: Are you through? You are wasting too much time. This case could have been tried inside of one hour and a half at the most. We will go without lunch. The case must be finished by one o'clock. Mr. Costello:- I will submit the case without argument. Mr. Zully:- The Court is in a hurry. Under the circumstances, we will have to abstain from arguing the case."

A written motion for a new trial, specifying the points relied upon, was filed. The only possible reference therein to the matter above quoted is to the effect that the Court erred in unduly restricting the argument of appellant's counsel to ten minutes; that appellant was deprived of the opportunity of presenting her case fully and fairly by the undue restriction and limitation of time for the trial of the case. There is nothing in the record to indicate that appellant's counsel were limited to a ten minutes' argument, nor is there anything to show that the Court said anything about limiting the time that counsel should take for the trial of the cause, except the remark above quoted

[illegible] argues that her counsel were denied the right of making a fair statement to the jury of the issues in the case, the trial judge erroneously in overruling the objection of the appellants thereto. This argument is based solely upon the last sentence of an attorney's [illegible] making the closing statement to the jury and was given in [illegible] instructions, the court said:- "Take the closing statement to the jury, which is helpful and [illegible]. In reading of the pleadings." It will be observed that counsel were not denied the right of making a fair statement to the jury of the issues in the case, as the facts they presented were, in the opinion of law applicable thereto. The court simply suggested to counsel that he should not read the pleadings. While it that counsel was at liberty to inform the jury as to the issues in the case, as it did in regards to proof and the [illegible] applicable thereto.

In the close of the argument counsel [illegible]:- "Counsel: Let you [illegible]? You are wasting too much time. [illegible] was still have very brief limits of one hour and a half to [illegible] your. I will go without issues. The case must be finished [illegible] the [illegible]. Dr. [illegible]:- I will [illegible] the case without argument. Dr. [illegible]:- The court is in a hurry. Under the circumstances, we will have to abstain from arguing the case."

A motion asking for a new trial, specifying the [illegible] , was filed. The only [illegible] [illegible] in the motion above quoted is to the effect that the court erred in [illegible] restricting the argument of appellant's counsel to [illegible]. That appellant was deprived of the opportunity of [illegible] [illegible] was fully and fairly by the [illegible] [illegible] of time for the trial of the case. There is nothing [illegible] the record to indicate that appellant's counsel, were limited [illegible] a fair and [illegible] argument, and in fact appellant is also that the [illegible] fair argument about limiting the time that counsel should [illegible] for the trial of the cause, except the remark above quoted

-2-

which was made after the evidence was closed. It will be observed that in her motion for a new trial appellant did not rely upon the ground that the Court made improper remarks in the presence of the jury. It would have been better if the remark had not been made, but appellant is in no position to complain.

When the case was called for trial in its regular order the Court ordered the clerk to call a jury. One of appellant's attorneys then stated that they had just discovered that Dr. McNary who was subpoenaed to appear as a witness for appellant, was unavoidably absent from town, that counsel were informed that the doctor would return that night and would be available as a witness the next morning; that he was the only doctor who attended appellant for the injuries in question and was the only expert witness who knew anything about them. Counsel then asked that the case be laid over until the next morning. The Court then said to proceed with the trial. Counsel presented no affidavit and did not offer to be sworn to his statement. In the motion for a new trial no reference whatever was made to that matter and appellant is in no position to complain thereof.

Appellant saw fit to submit her case to the jury without offering an instruction in her behalf. She complains that the instructions given for appellee were erroneous. We have carefully considered the instructions and the criticisms directed against them and are of the opinion that the Court did not err in its rulings thereon.

Appellant argues that she was in the exercise of due care and caution for her own safety at and immediately prior to the time of the injury and that she was struck and injured by reason of the negligence of appellee. Appellant testified in her own behalf and she had no other witness. Illinois Avenue runs east and west, and Collinsville Avenue north and south. The evidence shows that there are two street car tracks on Collinsville Avenue. Counsel for appellant say that there are also two street car tracks on Illinois

[illegible] was made after the evidence was closed. It will be observed that in her motion for a new trial appellant did not rely upon the [illegible]. It would have been better if the remark had not been made. [illegible] appellant is in no position to complain.

When the case was called for trial in its regular order the Court ordered the clerk to call a jury. One of appellant's witnesses then stated that they had just discovered that Dr. McKay [illegible] to appear as a witness for appellant, was unavoidably absent from town, that counsel were informed that the doctor would return that night and would be available at [illegible] the next morning; that if may the only [illegible] appellant in the [illegible] in proving and was the only [illegible] that [illegible] the case be held over until the next morning. The Court then said he would [illegible] the [illegible] presented no affidavit and did not offer to be sworn to his testimony. In the motion for a new trial no reference whatever was made to that matter and appellant is in no position to complain thereof.

Appellant saw fit to submit her case to the jury without asking an instruction in her behalf. The complaints that the instructions given for appellee were erroneous. We have carefully considered the last motions and the criticisms directed against them and are of the opinion that the Court did not err in the rulings [illegible].

Appellant argues that she was in the exercise of due care and caution for her own safety at and immediately prior to the time of the injury and that she was struck and injured by reason of the negligence of appellee. Appellant testified in her own behalf and she had no other witness. Illinois Avenue runs east and west, and Gillmerville avenue north and south. The evidence shows that there are two street car tracks on Gillmerville Avenue. Counsel for appellant say that there are also two street car tracks on Illinois

Avenue, but if so, the record does not show the fact. Appellant testified that she was on the sidewalk on the east side of Collinsville Avenue going north; that before she stepped off the curb she looked both ways before she started to cross and that when she had taken eight or ten steps she was struck by the truck and that she was then on the first street car track. The testimony on behalf of appellant tended to show that she was going south from the northeast corner of the intersection instead of north from the southeast corner thereof; that she was struck when she was upon the easterly street car track on Collinsville Avenue, and that said track was ten or twelve feet west of the east line of the pavement on Collinsville Avenue. If the testimony on behalf of appellee is true, appellant must have been in the act of crossing Illinois Avenue diagonally from the northeast corner of the intersection and she must have been several feet west of the regular line of travel for pedestrians. The driver of the truck had approached the crossing from the north and intended to turn east at the intersection on Illinois Avenue. He says that when he reached the point where he should turn east he had to wait for a street car to pass on Collinsville Avenue, and after the car passed he made the turn and as he did so appellant struck or was struck by the radiator. He says he had no time to warn her, that he stopped his truck immediately, jumped off and went to her; that she was up before he got to her and that she insisted to him and to a policeman who was present, that she was not hurt.

It is apparent, therefore, that the questions of negligence and contributory negligence, were questions of fact for the jury. No reversible error having been pointed out the judgment is affirmed.

AFFIRMED.

Not to be reported

[illegible]

Avenue, but if so, the record does not show the fact. Appellant testified that she was on the sidewalk on the east side of Collinsville Avenue going north; that before she stepped off the curb she looked both ways before she started to cross and that when she had taken eight or ten steps she was struck by the truck and that she was then on the first street car track. The testimony on behalf of appellant tended to show that she was going south from the northwest corner of the intersection instead of north from the southwest corner thereof; that she was struck when she was upon the center of street car track on Collinsville Avenue, and that said track was on twelve feet west of the east line of the pavement on Collinsville Avenue. If the testimony on behalf of appellee is true, appellant must have been in the act of crossing Illinois Avenue diagonally from the northwest corner of the intersection and she must have been several feet west of the regular line of travel for pedestrians. The driver of the truck had a proceeding the crossing from the north and intended to turn east at the intersection on Illinois Avenue. He says that when he reached the point where he should turn east he had to wait for a street car to pass on Collinsville Avenue, and after the car passed he made the turn and as he did so appellant struck or was struck by the radiator. He says he had no time to warn her, that he stopped his truck immediately, jumped off and went to her; that she was up before he got to her and that she insisted to him and to a policeman who was present, that she was not hurt.

It is apparent, therefore, that the questions of negligence and contributory negligence, were questions of fact for the jury. The verdicts error having been rendered and the judgment of affirmed.

[illegible]

[illegible]

5794

STATE OF ILLINOIS.

APPELLATE COURT

4TH. DISTRICT.

OCTOBER TERM, A. D. 1926.

TERM NO. 55. AG. NO. 31.

H. P. HOTZ, Appellee,	:	APPEAL FROM
VS.	:	MADISON
JAMES U. DUFFIN, Appellant.	:	CIRCUIT COURT.

Barry, P. J. - Appellee brought this action of forcible entry and detainer to recover the possession of certain premises. A jury was waived and at the close of the evidence for appellee appellant moved the Court to find the issues in his favor. The motion was denied, and appellant offered no evidence. The Court found the issues in favor of appellee and rendered judgment accordingly.

In his original brief and argument appellant made no claim that the evidence was insufficient to establish the relation of landlord and tenant between the parties. He was permitted, on cross-examination of appellee, to show that while J. J. McGowan conveyed the premises to appellee by warranty deed the title was simply held as security for a debt of the grantor. In his statement of the case appellant says:- "The position taken by appellant is that the deed to the premise which appellee holds is, in fact, a mortgage, and that, appellee being a mortgagee only, he is not entitled to the possession

of the premises in question, and that appellee, not being entitled to the present possession of the premises cannot maintain an action for their possession under the Forcible Entry and Detainer Act."

Appellee answered that contention by citing authorities to the effect that a tenant cannot dispute the title of his landlord either by setting up title in himself or a third person. In his reply brief appellant admits that such is the law, but insists, for the first time, that the rule does not apply to this case because the relation of landlord and tenant never existed between the parties. We have carefully considered the evidence and think it is sufficient to show that appellant was in possession of the premises as a tenant of appellee. That being true the mere fact that he was also a mortgagee would not bar a recovery. When the complaint was filed appellant had failed to pay his rent within five days after a written notice and demand was served upon him. Appellee was entitled to the possession of the premises and the judgment is affirmed.

AFFIRMED.

Not to be reported

5795

STATE OF ILLINOIS.

APPELLATE COURT

4TH. DISTRICT.

OCTOBER TERM, A. D. 1926.

TERM NO. 57. AG. NO. 25.

M. W. COCKRUM, Appellee,	:	APPEAL FROM
VS.	:	FRANKLIN
CHARLES GUALDONI, et al., Appellants.	:	CIRCUIT COURT.

Barry, P. J. - Appellee was the owner of a thirty acre tract of land within the corporate limits of the City of Sesser, Illinois, adjoining the switch-yard and tracks of the C.B. & Q. Railroad Company. In 1921 he sold the land to appellants for $9,000.00. A portion of the purchase price was paid in cash, and notes were given for the balance, all of which were paid except two for $2,000.00 each. They were judgment notes and appellee took judgment by confession which was opened on motion of appellants and they were given leave to plead.

Appellants filed the general issue and also a special plea in which it was averred that at the time of the purchase and as a part of the consideration therefor appellee agreed to extend Jordan street across the tracks and right of way of the railroad company; that relying upon the promise of appellee, appellants platted the said land into town lots for the purpose of selling the same; that without the extension of said street across the said

railroad tracks the said land was of no value except for agricultural purposes and that for such purposes it was only worth $4500.00, etc. To the special plea appellee filed a replication denying that he agreed to extend said street, etc.

The trial resulted in a verdict and judgment for $4,000.00. No instructions were asked on either side and for some reason the jury allowed no interest on the notes. Appellants contend that the judgment should be reversed because of the fact that the jury did not allow appellee interest, but we are of the opinion that we would not be warranted in reversing the judgment on that graund.

At the time of the sale, appellee was more than eighty years of age, and appellants were business men of experience and in the prime of life. They claimed to have a verbal agreement with appellee in regard to the extension of the street across the railroad tracks at grade. Appellee testified that at the time of the sale he did not agree that he would extend the street, but informed appellants that the railroad company had purchased other land from him and had promised him a crossing but that he did not know whether they would give him a crossing without a lawsuit. All of the parties were presumed to know the law. The power to extend streets in the city is vested in the City Council, Callaghan's Ill. St. An. ch. 24, par. 65, cl. 7. Under section 58 of the Public Utilities Act, appellee could not have the street extended without permission from the Utilities Commission. If the railroad company were willing that the street be extended across its tracks, appellee would be powerless to extend the street without the co-operation of the City Council and the Utilities Commission. That being true it seems a little strange that appellants would rely upon the alleged parol agreement with a man over eighty years of age, and pay $5,000.00 in cash, accept

At the time of the suit, appellee was more than eighty years of age, and appellants were business men of experience and in the prime of life. They claimed to have a verbal agreement with appellee in regard to the extension of the street across the railroad tracks at grade. Appellee testified that at the time of the suit he did not agree that he would extend the street, but informed appellants that the railroad company had purchased other land from him and had promised him a crossing but that he did not know whether they would give him a crossing without a lawsuit. All of the parties were presumed to know the law. The power to extend streets in the city is vested in the City Council, Gallagher's Ill. St. Ann. ch. 24, par. 65, cl. 7. Under section 58 of the Public Utilities Act, appellee could not have the street established without permission from the Public Utilities Commission. If the railroad company were willing that the street be extended across its tracks, appellee would be powerless to extend the street without the co-operation of the City Council and the Public Utilities Commission. That being true it seems a little strange that appellants would rely upon the alleged parol agreement with a man over eighty years of age, and pay $5,000.00 in cash, accept

a deed and take no steps to enforce the alleged contract until they were sued for the balance of the purchase price.

From a careful consideration of all the evidence we are of the opinion that we would not be warranted in setting aside the verdict of the jury on the ground that it is so manifestly against the weight of the evidence that it should not be permitted to stand. No reversible error having been pointed out the judgment is affirmed .

AFFIRMED.

Not to be reported

5746

STATE OF ILLINOIS.

APPELLATE COURT

4TH. DISTRICT.

OCTOBER TERM, A. D. 1926.

TERM NO 62. AG. NO. 4.

CHRISTINA BOLK, Executrix, etc., Appellee,	:	APPEAL FROM
VS.	:	
	:	CLINTON
BEN ALBERS, Appellant.	:	CIRCUIT COURT.

Barry, P. J. - Appellee sued to recover damages for the death of her husband, Henry Bolk, alleged to have been caused by the wrongful act of the appellant. Her declaration averred, that, on February 15, 1925, appellant willfully and unlawfully assaulted and beat Bolk with a chair and other wooden instruments and with his fists thereby inflicting bruises, wounds and injuries from which he died on March 6, 1925, etc. The trial resulted in a verdict and judgment for $1800.00.

Appellant contends that he was charged with murder and insists that the Court erred in instructing the jury that appellee was only required to prove her case by a preponderance of the evidence. If an indictment, containing the same averments as the declaration in this case, were returned against appellant he would very promptly move the Court to quash the same and the motion would be allowed. Malice is an essential ingredient and an indictment which fails to aver that the killing was with malice aforethought would be fatally defective.

In a case of this kind the cause of action is the wrongful act, neglect or default which causes the death, Crane vs. C.W. & J.R.R. Co., 233 Ill. 259; Mooney vs. City of Chicago, 239 Ill. 414. The wrongful act charged in the case at bar is an assault and battery and appellee was only required to prove her case by a preponderance of the evidence, Miller vs. Balthasser, 78 Ill. 302; Burgiel vs. Aniol, 218 App. 466. To entitle Appellee to recover it was not necessary to prove that appellant was guilty of murder. In an action ex delicto, if the plaintiff proves enough of the material allegations of his declaration to make out a cause of action he is entitled to recover, even though all of the averments are not proven, Postal T. - C. Co., vs. Likes, 225 Ill. 249.

Appellant did not request the Court to instruct the jury that appellee must prove her case beyond all reasonable doubt and the instructions requested by him fairly conceded that a preponderance of the evidence was sufficient. That being true, he is in no position to complain of the court's rulings on instructions in that regard.

Appellant argues that the proof fails to support the declaration, that the verdict is contrary to the weight of the evidence, and that it was the result of passion and prejudice. Appellant and Bolk met in a soft drink parlor at Breese, Illinois. Appellant wanted Bolk to pay for a dog, and Bolk said he had already paid for it. Appellant became very angry, swore and used bad language. He seized a chair with both hands, lifted it and staggered toward Bolk, who was seen by one of the witnesses to be falling to the floor and appellant with him. During the trouble a City Alderman who was present, told the bar-tender to stop the fight. Appellant said he was going to get Bolk and the bar-tender told him to not hit him and to behave himself or he must leave; that the bar-tender told him he must not do it several times. The bar-tender says he grabbed appellant and was trying to keep him off Bolk; that he held appellant from the time the

In a case of this kind the burden of [illegible] is [illegible] and, perhaps, [illegible] the [illegible]. Illinois [illegible] Co., [illegible] Ill. [illegible]; Chicago [illegible] City of Chicago, [illegible] Ill. 416. The [illegible] charged in the case at bar is [illegible] assault and battery and appellee was only required to prove her case by a preponderance of the evidence, Miller vs. Bellbeaser, [illegible] Ill. 502; Burgess vs. Baird, 218 App. 466. To entitle appellee to recover it was not necessary to prove that appellant was guilty of murder. In an action ex delicto, if the plaintiff proves [illegible] of the material allegations of his declaration to make out a cause of action he is entitled to recovery, even though all of the evidence are not correct. Chicago [illegible] - [illegible] Co., [illegible] Ill. [illegible].

Appellant did not request the court to instruct the jury that appellee must prove her case beyond all reasonable doubt. Nor did he request the instructions requested by him fairly embodied that a preponderance of the evidence was sufficient. That being true, he is in no position to complain of the court's rulings on instructions in that regard.

Appellant argues that the proof fails to support the judgment, that the verdict is contrary to the weight of the evidence, and that it was the result of passion and prejudice. Appellant and Bolk met in a soft drink parlor at Zeeeee, Illinois. Appellant wanted Bolk to pay for a dog, and Bolk said he had already paid for it. Appellant became very angry, swore and used [illegible] language. He seized a chair with both hands, lifted it and [illegible] toward Bolk, who was seen by one of the witnesses to be [illegible] by the floor and appellant with him. During the trouble a City Alderman who was present, told the bar-tender to stop the fight. Appellant said he was going to get Bolk and the bar-tender told him to not hit him and to behave himself or he must leave; that the bar-tender told him he must not do it several times. The bar-tender had to grabbed appellant and was trying to keep him off Bolk; that he held appellant from the time the

alderman left the room until he returned with a policeman. The alderman says that he found the policeman about five hundred feet from the room where the trouble occurred. He also says that when he returned with the policeman Bolk accused appellant of having hurt his shoulder and there is no showing that appellant replied to that accusation.

While no witness testified to having seen appellant strike Bolk with the chair, it is quite apparent that those who were present were friendly to appellant and the whole situation was such as to give rise to a reasonable inference that such a blow was struck. There is evidence that appellant slapped Bolk and that appellant stated a few days later that he had knocked Bolk off the table. Many of the facts aforesaid are undisputed, as is the fact that Bolk complained at the time that appellant hurt his shoulder.

The next day the doctor was called and an X-Ray disclosed that the head of the humerus was out of its socket and the bone was completely broken off. An operation became necessary and although all of the usual precautions were taken it was followed by blood poisoning from which Bolk died. Appellant called three witnesses, who testified that while Bolk was at the hospital he told them that his condition was due to a fall.

In the state of the proof we would not be warranted in holding that the evidence fails to support the declaration, or that the verdict is so manifestly against the weight of the evidence that it should not be permitted to stand, or that it is the result of passion and prejudice. No reversible error having been pointed out, the judgment is affirmed.

AFFIRMED.

Not to be reported

[illegible] left the room until he returned with a policeman. The [illegible] says that he found the policeman about five hundred [illegible] the room where the trouble occurred. He also says that [illegible] he returned with the policeman Bolk accused appellant of [illegible] hurt his shoulder and there is no showing that appellant [illegible] to that accusation.

While no witness testified to having seen appellant [illegible] there is evidence that appellant charged Bolk [illegible] appellant stated a few days later that he had knocked [illegible] off the table. Many of the facts aforesaid are undisputed [illegible] in the [illegible] and [illegible] [illegible] [illegible].

The next day the doctor was called and an X-Ray [illegible] that the head of the humerus was out of its socket [illegible] was completely broken off. An operation became [illegible] and all hands of the usual pressure were taken [illegible] followed by blood poisoning from which Bolk died. Appellant [illegible] three witnesses, who testified that while Bolk was at [illegible] he told them that his condition was due to a fall.

In the state of the proof we would not be warranted [illegible] that the evidence fails to support the defendant's [illegible] the verdict is so manifestly against the weight of [illegible] the evidence that it should not be permitted to stand, or that it [illegible] the result of passion and prejudice. No reversible error [illegible] pointed out, the judgment is affirmed.

[illegible]

[illegible]

5772

Term No. 27 Agenda No. 21

To The

APPELLATE COURT OF ILLINOIS,

Fourth District.

OCTOBER TERM, A. D. 1926

ROBERT SELINO, Plaintiff in Error,	Error to the Randolph County Circuit Court
-vs-	
JOHN PETTY, FAITH PETTY and A. J. WYLIE, Defendants in Error.	

OPINION by BOGGS, J.

Plaintiff in error filed a bill in the circuit court of Randolph County to the September term, 1925, in and by which bill it is averred that on March 4th, 1922, plaintiff in error recovered a judgment in the circuit court of Franklin county against John Petty, one of the defendants in error herein; Dr. Evan W. Petty and one Louis Penozzo, in the sum of $2,186.91; that previous to the rendition of said judgment, the said John Petty was the owner of certain real estate described in said bill, located in Randolph County, subject to two certain mortgages, one for $2,400 and theother for $600; that on March 7th, 1922, plaintiff in error caused an execution to be issued on said judgment to the sheriff of Franklin county, on which a return was made, "Defendant not found in my county, execution

not satisfied." That on July 3rd, 1922, an alias execution was issued to the sheriff of Franklin county, and a return was made thereon: "Not served, defendant not found in my county." That thereafter, on August 29th, 1925, plaintiff in error filed a transcript of said judgment in the office of the clerk of the circuit court of Randolph county; that on said date an execution was issued thereon to the sheriff of Randolph county, which said execution was returned on September 3rd, 1925: "No property found." That on May 23rd, 1921, prior to the date of the rendition of said judgment, "but after the indebtedness for which said judgment was rendered had been incurred, the said John Petty made a pretended conveyance in fee of the above mentioned real estate to A. J. Wylie, another defendant hereinafter named, for a pretended consideration of $1.00. ..... That the said conveyance was not bona fide, and was not real, but was a mere sham and was made with the intention of defrauding your orator and the other creditors of the said defendant John Petty out of their just demands. ..... That on the same day the said A. J. Wylie made a fraudulent and pretended conveyance in fee simple of the real estate hereinbefore described, for a pretended consideration of $1.00 to the said Faith Petty; ..... that the said premises are now held by the said Faith Petty, wife aforesaid of the said John Petty, in trust for the said John Petty and for the use, enjoyment and benefit of the said John Petty, and for the fraudulent purpose of preventing a levy and sale of the said real estate under and by virtue of said execution."

Said bill further sets forth that the said John Petty is a man of no pecuniary responsibility and is possessed of little or no property other than that he fraudulently conveyed to his said wife, and that the said John Petty "is not possessed of any goods and chattels above his exemptions, and that he has no personal or real estate liable to levy and sale, except the

not satisfied." That on July 3rd, 1922, an alias execution was issued to the sheriff of Franklin county, and a return was made thereon: "Not served, defendant not found in my county." That thereafter, on August 29th, 1922, plaintiff in error filed a transcript of said judgment in the office of the clerk of the circuit court of Randolph county; that on said date an execution was issued thereon to the sheriff of Randolph county, which said execution was returned on September 3rd, 1922: "No property found." That on May 23rd, 1921, prior to the date of the rendition of said judgment, "but after the indebtedness for which said judgment was rendered had been incurred, the said John Petty made a pretended conveyance in fee of the above mentioned real estate to A. J. Wylie, another defendant herein named, for a pretended consideration of $1.00. ..... That the said conveyance was not bona fide, and was not real, but was a mere sham and was made with the intention of defrauding your orator and the other creditors of the said defendant John Petty out of their just demands. ..... That on the same day the said A. J. Wylie made a fraudulent and pretended conveyance in fee simple of the real estate hereinbefore described, for a pretended consideration of $1.00 to the said Faith Petty; ..... the said premises are now held by the said Faith Petty, wife aforesaid of the said John Petty, in trust for the said John Petty and for the use, enjoyment and benefit of the said John Petty, and for the fraudulent purpose of preventing a levy and sale of the said real estate under and by virtue of said execution."

Said bill further sets forth that the said John Petty is a man of no pecuniary responsibility and is possessed of little or no property other than that he fraudulently conveyed to his said wife, and that the said John Petty "is not possessed of any goods and chattels above his exemptions, and that he has no personal or real estate liable to levy and sale, except the

premises above mentioned," and prayed that the said deeds above mentioned be set aside, etc., and that said real estate be made liable to the lien of said judgment and execution.

To said bill, separate answers were filed by John Petty, his wife, Faith Petty, and the said A. J. Wylie.

The answer of Faith Petty is to the effect that said premises were purchased with the money of herself and John Petty, and the title to the same was taken in the name of John Petty; that a mortgage of $2,400 was placed on the same to the Sparta Building & Loan Association to pay for certain buildings erected on said premises and for other improvements made on said real estate; that thereafter another mortgage of $600 was made to said loan association and that the proceeds of said $600 mortgage were turned over to John Petty to reimburse him for the money he had placed in said premises; that the dues and interest on said mortgages were all paid by the said Faith Petty, and that she was the equitable owner of said premises, and that the said John Petty, in order to place the legal title in his wife, conveyed the same to the said A. J. Wylie and said Wylie conveyed to the said Faith Petty. Said defendant in error specifically denied the allegation that said conveyance was made to her as a sham and for the purpose of hindering and delaying creditors, but averred that the same was made for valuable considerations as above set forth. She further denied that she had any knowledge of the indebtedness owing by her husband to said John Musatto, for which judgment was afterward taken in the name of plaintiff in error, assignee of the note on which said judgment was taken.

The answer of John Petty was to the same effect as the answer of Faith Petty, except that it does not go into detail quite so fully, and does not aver lack of knowledge on the part of Faith Petty of the indebtedness for which said judgment was taken.

premises above mentioned," and prayed that the said deeds above mentioned be set aside, etc., and that said real estate be made liable to the lien of said judgment and execution.

To said bill, separate answers were filed by John Petty, his wife, Ruth Petty, and the said A. J. Wylie.

The answer of Ruth Petty is to the effect that said premises were purchased with the money of herself and John Petty, and the title to the same was taken in the name of John Petty; that a mortgage of $3,400 was placed on the same to the Equitable Building & Loan Association to pay for certain buildings erected on said premises and for other improvements made on said real estate; that thereafter another mortgage of $800 was made to said loan association and that the proceeds of said $800 mortgage were turned over to John Petty to reimburse him for the money he had placed in said premises; that the dues and interest on said mortgages were all paid by the said Ruth Petty, and that she was the equitable owner of said premises, and that the said John Petty, in order to place the legal title in his wife, conveyed the same to the said A. J. Wylie and said Wylie conveyed to the said Ruth Petty. Said defendant in error specifically denied the allegation that said conveyance was made to her as a sham and for the purpose of hindering and delaying creditors, but averred that the same was made for valuable considerations as above set forth. She further denied that she had any knowledge of the indebtedness owing by her husband to the Massello, for which judgment was afterward taken in the name of plaintiff in error, assignee of the note on which said judgment was taken.

The answer of John Petty was to the same effect as the answer of Ruth Petty, except that it does not go into detail quite so fully, and does not aver lack of knowledge on the part of Ruth Petty of the indebtedness for which said judgment was taken.

Replications were filed to said answers and the cause was referred to the master to take the evidence and report the same to the court. The evidence was taken and reported to the court, and on hearing the court found the issues for the defendants in error, and dismissed the bill for want of equity. To reverse said decree, this writ of error is prosecuted.

It should first be observed that the report of the master and the certificate of evidence do not include all of the evidence heard in said cause. A large number of the exhibits which were offered in evidence are not included in the master's report nor in the judge's certificate, but purport to be certified only by the clerk. The record also fails to include the judgment referred to in said bill; in other words, the record affirmatively shows that neither said judgment nor the transcript thereof filed in Randolph county was ever offered in evidence. The failure of the record to include all of the evidence, and especially the judgment which is the basis of this proceeding, would warrant this court in affirming the judgment. However, we have deemed best to consider the case on the merits, as counsel on both sides have treated the case as though the record were in condition to warrant such consideration.

There is no evidence in the record proving or tending to prove actual fraud in the making of said conveyances, by virtue of which the title to the premises in question vested in Faith Petty. It has uniformly been held by the courts of this state that allegations of fraud against creditors in a transaction of this character must be established by clear and satisfactory evidence. Bonnell v. Wilder, 67 Ill. 327; Bowden v. Bowden, 75 Ill. 143; Pratt v. Pratt, 96 Ill. 184; Schroeder v. Walsh, 120 Ill. 402.

The evidence on the part of defendants in error Faith Petty and John Petty is to the effect that John Petty and Faith

Replications were filed to said answers and the cause was referred to the master to take the evidence and report the same to the court. The evidence was taken and reported to the court, and on hearing the court found the issues for the defendants in error, and dismissed the bill for want of equity. To reverse said decree, this writ of error is prosecuted.

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There is no evidence in the record creating any burden to prove actual fraud in the making of said conveyances, by virtue of which the title to the premises in question vested in [illegible]. It has uniformly been held by the courts of this state that allegations of fraud against creditors in a transaction of this character must be established by clear and satisfactory evidence. Donnell v. Miller, 87 Ill. 377; Dawson v. [illegible], 75 Ill. 443; Pratt v. Pratt, 68 Ill. 164; Schroeder v. [illegible], [illegible].

The witnesses on the part of [illegible] testified that [illegible] and John [illegible] is an [illegible] [illegible] the [illegible]

Petty each contributed $425 on the purchase of the premises in question; that thereafter a mortgage of $2,400 was made to the Sparta Building & Loan Association to pay for certain buildings and improvements made on said premises, and a second mortgage for $600 was made to said loan association by said parties, to reimburse John Petty for the funds he had contributed toward paying for said premises, and that all of the payments for dues and interest on said mortgages were paid by Faith Petty.

This being the state of the record, the allegation of actual fraud in the making of said conveyances is wholly unsupported by the evidence. Counsel for plaintiff in error contends, however, that whether or not there was actual fraud in the making of said conveyances, that their effect was to hinder and delay creditors, and that therefore such conveyances would be fraudulent in law.

Before a party is entitled to relief in a case of this character, it is necessary to allege and prove a transfer which is in fact fraudulent as to creditors, or if the conveyance is a voluntary one from the husband to the wife, that the judgment debtor did not retain enough money or property to pay his debts. Dimond v. Rogers, 203 Ill. 464-468; State Bank of Clinton v. Barnett, 250 Ill. 318.

Plaintiff in error further contends that, inasmuch as the execution to the sheriff of Randolph county was returned, "No property found," that constitutes prima facie evidence of the insolvency of defendant in error John Petty. That statement is correct, applied to September 3rd, 1922, the time of the return of said execution, but it is not proof that on May 23rd, 1921, the date of said conveyances, said John Petty was insolvent. Merrell v. Johnson, 96 Ill. 224; Bittinger v. Kasten, 111 Ill. 260; Faloon v. McIntyre, 118 Ill. 292; State Bank of Clinton v. Barnett, supra. In the latter case, the court at page 318 says:

Petty each contributed $125 on the purchase of the premises in question; that thereafter a mortgage of $2,400 was made to the Sparta Building & Loan Association to pay for certain building and improvements made on said premises, and a second mortgage for $600 was made to said loan association by said parties, to reimburse John Petty for the funds he had contributed toward paying for said premises, and that all of the payments for dues and interest on said mortgages were paid by Ralph Petty.

This being the state of the record, the alleged of actual fraud in the making of said conveyances is wholly unsupported by the evidence. Counsel for plaintiff in error in contends, however, that whether or not there was actual fraud in the making of said conveyances, that their effect was to hinder and delay creditors, and that therefore such conveyances would be fraudulent in law.

Where in a party is entitled to relief in a case of this character, it is necessary to allege and prove a transfer which is in fact fraudulent as to creditors, or if the conveyance is a voluntary one from the husband to the wife, that the judgment debtor did not retain enough money or property to pay his debts. Dimond v. Rogers, 202 Ill. 464-469; State Bank of Clinton v. Barnett, 250 Ill. 512.

Plaintiff in error further contends that, inasmuch as the execution to the sheriff of Randolph county was returned, "no property found," that constitutes prima facie evidence of the insolvency of defendant in error John Petty. That statement is correct, applied to September 3rd, 1908, the time of the return of said execution, but it is not proof that on May 22nd, 1908, the date of said conveyances, said John Petty was insolvent. Merrill v. Johnson, 98 Ill. 224; Billingsley v. Kanten, 111 Ill. 160; Falloon v. Wolfrey, 118 Ill. 292; State Bank of Clinton v. Barnett, supra. In the latter case, the court said:

"The bill does aver, and the proof establishes, that appellee secured judgment against Mrs. Barnett, upon which execution was issued and returned nulla bona. This establishes prima facie the insolvency of Mrs. Barnett at the time of the return of the execution. There is no averment in the bill of the insolvency of Mrs. Barnett at thettime of the gift to appellant and there is no proof of that fact in the record. ..... Appellee having failed to prove fraud in fact, the burden of proof devolved upon it to show that Mrs. Barnett rendered herself insolvent by making this gift before it could establish presumptive or legal fraud. In passing upon this question in Moritz v. Hoffman, 35 Ill. 553, we said (p. 558): 'No one will dispute the principle appellant seeks to establish, that a voluntary conveyance, when the grantor is indebted at the time of its execution, is presumptive evidence of fraud; and a fraudulent intent will be presumed from the fact that the party conveying was indebted at the time the conveyance was executed, and that as to pre-existing creditors every conveyance not made on a consideration valuable in law is void. The principle is thus broadly stated, but it is subject to some qualification,--to this extent, at least, that the debtor retains in his possession property sufficient to discharge all debts existing at the time of making the conveyance alleged to be fraudulent. If this was not permitted, trade of every description would be very much crippled, and instead of there being an active interchange of property the whole business of the country would stagnate.'"

This latter case xx fully answers the contentions made by counsel for plaintiff in error, and shows that on this record under the law, plaintiff in error has wholly failed to make out a case. There is no allegation in the bill and there is no proof whatever to the effect that at the time of said conveyances John Petty had no property, or made himself insol-

"The bill does aver, and the proof establishes, that appellee secured judgment against Mrs. Barnett, upon which execution was issued and returned *nulla bona*. This establishes *prima facie* the insolvency of Mrs. Barnett at the time of the return of the execution. There is no averment in the bill of the insolvency of Mrs. Barnett at the time of the gift to appellant and there is no proof of that fact in the record. ..... Appellee having failed to prove fraud in fact, the burden of proof devolved upon it to show that Mrs. Barnett rendered herself insolvent by making this gift before it could establish presumptive or legal fraud. In passing upon this question in *Mobile* v. *Hoffman*, 55 Ill. 555, we said (p. 558): "No one will dispute the principle appellant seeks to establish, that a voluntary conveyance, when the grantor is indebted at the time of its execution, is presumptive evidence of fraud; and a fraudulent intent will be presumed from the fact that the party conveying was indebted at the time the conveyance was executed, and that as to pre-existing creditors every conveyance not made on a consideration valuable in law is void. The principle is thus broadly stated, but it is subject to some qualification,--to this extent, at least, that the debtor retaining in his possession property sufficient to discharge all debts existing at the time of making the conveyance ailged to be fraudulent, if this was not permitted, trade of every description would be very much crippled, and instead of there being an active interchange of property the whole bus ness of the country would stagnate."

"This latter case ex fully answers the contention made by counsel for plaintiff in error, and shows that on this under the law plaintiff in error has wholly failed to make out a case. There is no allegation in the bill and there is no proof whatever to the effect that at the time of said conveyance John Petty had no property, or made himself insol-

vent by virtue of said conveyances. The law further is that no creditor "without a lien has any right to complain that his debtor is giving away property to his wife or children, unless such creditor can establish the fact that he has not retained enough to satisfy existing debts. Such grantor must make himself insolvent by such gifts or conveyances, and to impeach them, fraud must be charged and proved." Moritz v. Hoffman, 35 Ill. 553. And in Falcon v. McIntyre, supra, the court holds "if the creditor fails to prove insolvency of the debtor at the time the conveyance is made, he is entitled to no relief."

It is also a principle of law uniformly laid down by our courts that, before a creditor can maintain an action in the nature of a creditor's bill to set aside a conveyance as being in fraud of creditors, he must first have exhausted his remedy at law. 27 Corp. Jur., sec. 578; McConnel v. Dickson, 43 Ill. 99-100; Wormwell v. Ward, 108 Ill. 216-219; Detroit Rolling Mills v. Ledwidge, 162 Ill. 305.

While the bill alleges that two executions were issued on the judgment to the sheriff of Franklin county, and that the first one was returned unsatisfied and the second was returned "Defendant not found," no executions to Franklin county were offered in evidence on the trial of said cause. There were other parties defendant to said judgment, and there is nothing in this record to show that said judgment could not have been satisfied out of the property of said defendants.

For the reasons above set forth, the judgment and decree dismissing said bill for want of equity will be affirmed.

Decree affirmed.

Not to be reported

vent by virtue of said conveyances. The law further is that no creditor "without a lien has any right to complain that his debtor is giving away property to his wife or children, unless such creditor can establish the fact that he has not retained enough to satisfy existing debts. Such creditor must make himself insolvent by such gifts or conveyances, and to impeach them, fraud must be charged and proved." Kerritz v. Hoffman, 55 Ill. 553. And in Salomon v. Stratmann, supra, the court holds "if the creditor fails to prove insolvency of the debtor at the time the conveyance is made, he is entitled to no relief."

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While the bill alleges that two executions were issued on the judgment to the sheriff of Franklin county, and that the first one was returned satisfied and the second was returned "defendant not found," no executions to Franklin county were offered in evidence on the trial of said cause. There were other parties defendant to said judgment, and there is nothing in this record to show that said judgment could not have been satisfied out of the property of said defendants.

For the reasons above set forth, the judgment and decree dismissing said bill for want of equity will be affirmed.

Decree affirmed.

Term No. 32 Agenda No. 27

In The

APPELLATE COURT OF ILLINOIS,

Fourth District.

OCTOBER TERM, A. D. 1926

ERNEST JENKINS, Appellant,	)	Appeal from the
-vs-	)	Saline County
ROBERT JENKINS, F. M. HART, NATHANIEL JENKINS, THOMAS JENKINS, D. F. RUMSEY, Appellees.	)	Circuit Court

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OPINION by BOGGS, J.

Appellant Ernest Jenkins filed a bill in the circuit court of Saline County to the April term, 1926, against appellees, alleging that they, with appellant, were sureties for one Robert Jenkins on six notes aggregating $6,514.53; that judgments were taken on said notes and were afterward satisfied out of the property of appellant; that on the date of the rendition of said judgments, and up to the time of the filing of said bill, said principal, Robert Jenkins, was and continued to remain insolvent, and that appellees severally became liable to pay their aliquot parts of said indebtedness, so satisfied out of appellant's property; praying relief, etc.

To said bill, appellees filed an answer, admitting

In The

APPELLATE COURT OF ILLINOIS,

Fourth District.

OCTOBER TERM, A. D. 1926

ERNEST JENKINS, Appellant,	Appeal from the
-vs-	Saline County
ROBERT JENKINS, F. M. HART, NATHANIEL JENKINS, THOMAS JENKINS, D. F. RUSSEY, Appellees.	Circuit Court

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OPINION by GOODE, J.

Appellant Ernest Jenkins filed a bill in the circuit court of Saline county to the April term, 1926, against appellees, alleging that they, with appellant, were sureties for one Robert Jenkins on six notes aggregating $2,214.88; that judgments were taken on said notes and were afterward satisfied out of the property of appellant; that on the date of the rendition of said judgments, and up to the time of the filing of said bill, said principal, Robert Jenkins, was and continued to remain insolvent, and that appellees severally became liable to pay their aliquot parts of said indebtedness, so satisfied out of appellant's property; praying relief, etc.

To said bill, appellees filed an answer, admitting

the making of said notes, the taking of judgment thereon, and the sale of appellant's real estate to satisfy the same, and further admitting that H. Robert Jenkins, one of the original signers on said notes, had deceased since the making of said notes and prior to the filing of said bill. Said answer expressly denied that appellant was a surety on said notes, and averred that he was a principal thereon with Robert Jenkins; denied that Robert Jenkins was insolvent at the time of the making of said notes, and expressly denied liability on the part of appellees for contribution as prayed for by appellant.

A trial was had before the chancellor in open court, a finding was made in favor of appellees, and appellant's bill was dismissed for want of equity, at his costs. To reverse said finding and decree, this appeal is prosecuted.

The record discloses that in November, 1918, the said Robert Jenkins and one Loren Jenkins formed a partnership for the purpose of operating a garage and conducting a sales agency in the city of Harrisburg. Said partnership continued until the latter part of 1920, at which time Loren Jenkins abandoned said partnership and thereafter had nothing to do with the business. Robert Jenkins ran the business alone until the early part of 1921, when appellant became a partner in said business theretofore conducted by Robert and Loren Jenkins. The record further discloses that while said business was being operated by Robert and Loren Jenkins, they became indebted to the extent of some $9,000 or $10,000, which indebtedness was evidenced by notes signed by Robert Jenkins and Loren Jenkins as principals, and by appellees as sureties. Appellant was not a signer on any of said notes at that time. These notes were renewed from time to time, and were outstanding and unpaid when appellant entered into said partnership with Robert Jenkins. During the partnership of Robert Jenkins and appellant, these notes became due and were renewed, Robert Jenkins and appellant signing said

the making of said notes, the taking of judgment thereon, and the sale of appellant's real estate to satisfy the same, and further admitting that H. Robert Jenkins, one of the original signers on said notes, had deceased since the making of said notes and prior to the filing of said bill. Said answer expressly denied that appellant was a surety on said notes, and averred that he was a principal thereon with Robert Jenkins; denied that Robert Jenkins was insolvent at the time of the making of said notes, and expressly denied liability on the part of appellees for contribution as prayed for by appellant.

A trial was had before the chancellor in open court, a finding was made in favor of appellees, and appellant's bill was dismissed for want of equity, at his costs. To reverse said finding and decree, this appeal is prosecuted.

The record discloses that in November, 1918, the said Robert Jenkins and one Loren Jenkins formed a partnership for the purpose of operating a garage and conducting a sales agency in the city of Harrisburg. Said partnership continued until the latter part of 1920, at which time Loren Jenkins abandoned said partnership and thereafter had nothing to do with the business. Robert Jenkins ran the business along until the early part of 1921, when appellant became a partner in said business theretofore conducted by Robert and Loren Jenkins. The record further discloses that while said business was being operated by Robert and Loren Jenkins, they became indebted to the extent of some $9,000 or $10,000, which indebtedness was evidenced by notes signed by Robert Jenkins and Loren Jenkins as principals, and by appellees as sureties. Appellant was not a signer on any of said notes at that time. These notes were renewed from time to time, and were outstanding and unpaid when appellant entered into said partnership with Robert Jenkins. During the partnership of Robert Jenkins and appellant, these notes became due and were renewed, Robert Jenkins and appellant signing said

renewal notes together with appellees. These latter notes are the notes upon which said judgments were rendered.

It is contended on the part of appellant that, as the notes formerly signed by Robert Jenkins and Loren Jenkins as principals and by appellees as sureties were renewed, that he, appellant, signed the same as surety and not as principal, and that, having had to pay said notes, he is entitled to contribution from appellees. On the other hand, appellees insist that when appellant entered said garage and sales business, he did so on the basis that he and Robert Jenkins would be liable for said indebtedness then owing by said firm; that at the time appellant entered into said partnership, it had assets consisting of certain automobiles, accessories, etc., claimed by appellees to have been worth from $9,000 to $10,000, and that appellant paid nothing therefor, other than his undertaking to become liable with Robert Jenkins for said indebtedness.

Appellant was the only witness testifying in support of his theory. While two or three witnesses testified in his behalf that when certain moneys were borrowed of them, Robert Jenkins transacted the business, and that they did not know of appellant's connection therewith, said testimony was of no particular probative value. On the other hand, the testimony of appellees is that appellant had in effect stated to them that he went into said business for the purpose of helping to pay the indebtedness.

Robert Jenkins testified, among other things: "He (appellant) was to go in business with me and help pay these debts and make the garage a paying proposition; help pay off these debts of mine and Loren's. He went in with me then. The notes at the City National Bank was renewed from time to time. They amounted to something like $9,000 or $10,000. When these notes had to be renewed they were renewed by Loren's name being left off and Ernest's going on." This witness further

renewal notes together with appellees. These latter notes are the notes upon which said judgments were rendered.

It is contended on the part of appellant that, as the notes formerly signed by Robert Jenkins and Loren Jenkins as principals and by appellees as sureties were renewed, that he, appellant, signed the same as surety and not as principal, and that, having had to pay said notes, he is entitled to contribution from appellees. On the other hand, appellees insist that when appellant entered said partnership and assumed business, he did so on the basis that he and Robert Jenkins would be liable for said indebtedness then owing by said firm; that at the time appellant entered into said partnership, it had assets consisting of certain automobiles, accessories, etc., claimed by appellees to have been worth from $9,000 to $10,000, and that appellant paid nothing therefor, other than his undertaking to become liable with Robert Jenkins for said indebtedness.

Appellant was the only witness testifying in support of his theory. While two or three witnesses testified in his behalf that when certain moneys were borrowed of them, Robert Jenkins transacted the business, and that they did not know of appellant's connection therewith, said testimony was of no particular probative value. On the other hand, the testimony of appellees is that appellant had in effect stated to them that he went into said business for the purpose of helping to pay the indebtedness.

Robert Jenkins testified, among other things: "He (appellant) was to go in business with me and help pay these debts and make the average a paying proposition; help pay off these debts of mine and Loren's. He went in with me then. The notes at the City National Bank was renewed from time to time. They amounted to something like $9,000 or $10,000. When these notes had to be renewed they were renewed by Loren's name being left off and Ernest's going on." This witness further

testified: "At the time of the dissolution of the partnership between me and Loren Jenkins in the latter part of 1920, we had several cars on hand. Some ten or twelve. They run $800 or $900 apiece, some of them. ..... We had some tools, fixtures, and a lot of accessories." This witness further testified: "When we (referring to appellant and himself) went in partners, I had an agreement with Ernest Jenkins that he was to pay as much as I was. ..... I don't remember the date of an agreement with Ernest with regard to him and me assuming the payment of these notes. It was the year 1921."

Appellee Nathaniel Jenkins testified that appellant said to him that "he had gone in business with Robert to pay this indebtedness." Appellee Thomas Jenkins testified that "Ernest said that he was a partner of the business, and could pay it off if they would give him a little time. He said that he would give a mortgage on his home if Nathaniel and I would give him security to get the money. He said that he would help to pay these old debts in the partnership. He said that he went in to help pay the business out. Said that he took Loren's part of it."

While the general rule is that an incoming or substituted partner is not liable for the existing obligations of the partnership, yet it is also true that an incoming or substituted partner is liable for existing indebtedness of the partnership if he expressly assumes such liability, by his contract of partnership. Frazer v. Howe, 106 Ill. 563; Penn v. Fogler, 182 Ill. 76; McCracken v. Milhous, 7 App. 169. The law further is that such assumption by the incoming or substituted partner need not necessarily be by an express undertaking. It can be inferred from the conduct of the party and the circumstances of the case. Frazer v. Howe, supra; Penn v. Fogler, supra; Salter v. Edward Hines Lumber Co., 77 App. 97; 20 R. C. L., p. 985, sec. 219.

testified: "At the time of the dissolution of the partnership between me and Lorenz Jaeffle in the latter part of 1920, we had several cars on hand. Some ten or twelve. They run $800 or $900 apiece, some of them. ..... We had some tools, fixtures, and a lot of accessories." This witness further testified: "When we [illegible] to dissolve [illegible] went to partners, I had an agreement with Ernest Jaeffle that he was to pay me as much as I was. ..... I don't remember the date of an agreement with Ernest with regard to him and me assuming the payment of these notes. It was the year 1921."

Appellee testified [illegible] that appellant said to him that "he had gone in business with Ernest in his independence." Appellee Jaeffle further testified that "Ernest said that he was a partner of the business, and could pay it off if they would give him a little time. He said that he would give a mortgage on his home if preferred and I would give his security to get the money. He said that he would help to pay these old debts in the partnership. He said that he went in to help pay the business out. Said that he took Lorenz's part of it."

While the general rule is that an insolvency or withdrawal partner is not liable for the relative obligations of the partnership, yet it is also true that an insolvent or withdrawal partner is liable for relative indebtedness of the partnership if he expressly assumes such liability, or his present act of partnership. Ferguson v. Howe, 106 Ill. 566; Penn v. Ensign, 188 Ill. 74; Lattimore v. Wilhoyte, 7 App. 189. The law further is that such assumption by the insolvent or withdrawal partner need not necessarily be by an express undertaking. It may be inferred from the consent of the parts and the circumstances of the case. Ferguson v. Howe, supra; Penn v. Ensign, supra; Miller v. Illinois River Packet Co., 77 App. 70; 20 L. U. A., p. 185, sec. 814.

Counsel representing the respective parties are practically agreed in their statements of the law governing the liability of a substituted partner. This case is therefore to be determined upon the facts. That being true, and the case having been heard by the chancellor in open court, we would not be warranted in disturbing the finding of the chancellor, unless such finding is clearly and palpably against the weight of the evidence. Fabrice v. Von der Brelie, 190 Ill. 460-465; Haug v. Haug, 198 Ill. 645-650; Hudson v. Hudson, 222 Ill. 527-528; Village of St. Anne v. Cover, 223 Ill. 96-98; Moneta v. Hoffman, 249 Ill. 56-69; Robinson v. Sharp, 103 App. 239.

In our judgment, the finding and decree are not against the weight of the evidence, but are amply sustained by the record.

For the reasons above set forth, the decree of the trial court will be affirmed.

Decree affirmed.

Not to be reported

Counsel representing the respondents urging an practically agreed interior statements of the jaw governing the liability of a municipal corporation. This case is therefore to be determined upon the facts. That being true, and the case having been heard by the chancellor in open court, we would not be concerned in disturbing the finding of the chancellor, unless such finding is clearly and manifestly against the weight of the evidence. Kennedy v. City of Duluth, 112 Ill. App. 480; Gage v. Gage, 108 Ill. App. 1; Cohen v. Tuley, 200 Ill. App. 2; Illinois C. R. R. Co. v. Cox, 77 Ill. App. 1; Lewis v. Duffield, 80 Ill. App. 1; Gardner v. Cole, 102 Ill. App. 2.

In our judgment, the finding and decree are not against the weight of the evidence, but are amply sustained by the record.

For the reasons above set forth, the decree of the trial court will be affirmed.

Decree affirmed.

Term No. 33 Agenda No. 33

In The

APPELLATE COURT OF ILLINOIS,

Fourth District.

OCTOBER TERM, A. D. 1926

CITIZENS STATE & TRUST BANK, Appellee,	)	Appeal from the
-vs-	)	Madison County
HENRY EIMERS and ALBERT EIMERS, Appellants.	)	Circuit Court

OPINION by DOGGS, J.

Judgment by confession on two promissory notes was entered September 2nd, 1925, in the circuit court of Madison county against appellants, in favor of appellee, for $5,244. On December 18th, 1925, on motion of appellants, the court opened up said judgments and gave appellants leave to plead. One of said notes, for $3,500, was given in final renewal of a note of $3,900, $400 having been paid on the principal; the other of said notes, being for $1,100, was given in renewal of a $2,000 note, $900 having been paid on the principal.

To the declaration, in the usual form, appellants filed the general issue and four special pleas.

By the first special plea, appellants aver that they were fraudulently induced by the officers of appellee bank to make and deliver to it each of said original notes, the allegation being as follows: "that the fraud of the plaintiff as

Page 15. 11

IN THE

APPELLATE COURT OF ILLINOIS,

Fourth District.

October Term, A. D. 1899.

ALBERT A. LIVINGSTON, Appellee,	Appeal from the
-vs-	Madison County
Mary Alonzo and ALBERT BIVERS, Appellants.	Circuit Court.

OPINION by GOODES, J.

Judgment by confession on the promissory notes was entered September 8th, 1898, in the Circuit Court of Madison county against appellants, in favor of appellee, for $5,000, on December 12th, 1892, on motion of appellee, the notes upon which said judgments and prior appellants had to plead, due of said notes, for $2,000, was given in final payment of a note of $2,000, then having been paid on the principal; the other of said notes, being for $3,000, was given in renewal of a $3,000 note, then having been paid on the principal.

In the instruction, in the usual form, appellants filed the general issue and four special pleas.

By the first special plea, appellants, after that they were fraudulently induced by the officers of appellee bank to make and deliver to it some of said original notes, the allegation being as follows: "that the fraud of the plaintiff in

to each of said notes consisted of the plaintiff, through its cashier, assisting and lending its influence to Jesse F. Keppel, W. L. Simpson and L. P. Bagby, so that said Keppel, Simpson and Bagby, through arrangements with plaintiff, fraudulently got possession of the proceeds of said $3,000 note and said $2,000 note, in payment of worthless stock of International Aerial Navigation Co., said plaintiff receiving benefits of the fraud by retaining a portion of each of said principal sums of $3,900 and $2,000, and delivering the balance thereof to said Keppel, Simpson and Bagby." Said plea further alleges that: "On June 13th, 1923, said agents again came to the home of the defendants and at that time brought with them a promissory note prepared on a printed form furnished by plaintiff, for the principal sum of $2,000 payable six months after date to the Citizens State & Trust Bank of Illinois, with interest at 5% per annum; that said note was brought to defendants without any request by defendants to said agents or to the plaintiff, or without any authority from them to said agents; that then and there, at the home of defendants, said agents solicited defendant Albert Eimers to purchase stock in said company, and solicited both defendants to sign said note for $2,000: that defendant Albert Eimers agreed to take stock in said company, and both defendants signed said note for the principal sum of $2,000."

It was further averred in said plea that said Keppel, Simpson and Bagby took the note for $2,000 to the bank and delivered the same to said bank and that said bank paid to said Keppel, Simpson and Bagby $1,950 therefor. Said plea further avers that said stock was issued by a Missouri corporation; that said stock was of no value, and that the charter of said corporation was forfeited on January 1st, 1925, for failure to comply with the annual registration laws of Missouri for the year 1924;" that said agents "falsely and fraudulently repre-

to each of said notes constituted of the plaintiff, through its cashier, assisting and lending its influence to James P. Terpel, W. L. Simpson and L. P. Bagby, so that said Terpel, Simpson and Bagby, through arrangements with plaintiff, fraudulently got possession of the proceeds of said $2,000 note and said $2,000 note, in payment of worthless stock of International Aerial Navigation Co., said plaintiff receiving benefits of the fraud by retaining a portion of each of said principal sums of $3,000 and $2,000, and delivering the balance thereof to said Keppel, Simpson and Bagby." Said plea further alleges that: "On June 13th, 1922, said agents again came to the home of the defendants and at that time brought with them a promissory note prepared on a printed form furnished by plaintiff, for the principal sum of $2,000 payable six months after date to the Citizens State & Trust Bank of Illinois, with interest at 8% per annum; that said note was brought to defendants without any request by defendants to said agents or to the plaintiff, or without any authority from them to said agents: that then and there, at the home of defendants, said agents solicited defendant Albert Simms to purchase stock in said company, and solicited both defendants to sign said note for $2,000: that defendant Albert Simms agreed to take stock in said company, and both defendants signed said note for the principal sum of $2,000." [illegible]

It was further averred in said plea that said Terpel, Simpson and Bagby took the note for $2,000 to the bank and delivered the same to said bank and that said bank paid to said Keppel, Simpson and Bagby $1,950 therefor. Said plea further avers that said stock was issued by a Missouri corporation; that said stock was of no value, and that the charter of said corporation was forfeited on January 1st, 1922, for failure to comply with the annual registration laws of Missouri for the year 1921;" that said agents "falsely and fraudulently perpe-

sented that the stock of said corporation which they were selling defendants was valuable stock, and therefore, confiding in the false and fraudulent representations aforesaid, and having great confidence in the plaintiff and believing that the plaintiff would not, through its cashier and agents, carry on its negotiations and dealings as aforesaid with and through said Keppel, Simpson and Bagby unless the latter were well worthy of trust and confidence, defendants then and there signed said original promissory notes, and not otherwise, and without any consideration whatever."

The second plea is of a similar character, and is confined to the matter of the note of $3,500. The third plea is similar to the first in its averment of facts, but is restricted to the $1,100 note. The fourth plea sets up the defense of usury, and seeks to have credit on the principal for all payments of interest made by appellants on any of said notes.

Replications were filed to said special pleas; a trial was had before the court without a jury, a finding was made in favor of appellee, damages were assessed at $5,244. and an order was made that the judgment entered on September 2nd, 1925, for $5,244, stand as the judgment of the trial court. To reverse said judgment, this appeal is prosecuted.

It is first contended by appellants that the officers of appellee bank had actual knowledge, or that the facts and circumstances in connection with the making of the notes in question were such as to warrant the court in holding said bank and its officers to have had constructive notice of the character of the business being transacted by Keppel Simpson and Bagby, and that appellee bank, having profited by a discount made by them of 2½% on the notes sued on, it thereby became a participant in the fruits of said fraud, and by virtue thereof said bank is not entitled to recover any part of the

sented that the stock of said corporation which they were selling defendants was valuable stock, and therefore, confiding in the false and fraudulent representations aforesaid, and having great confidence in the plaintiff and believing that the plaintiff would not, through its cashier and agents, carry on its negotiations and dealings as aforesaid with and through said Kepper, Simpson and Bagby unless the latter were well worthy of trust and confidence, defendants then and there signed said original promissory notes, and not otherwise, and without any consideration whatever."

The second plea is of a similar character, and is confined to the matter of the note of $3,500. The third plea is similar to the first in its averment of facts, but is restricted to the $1,100 note. The fourth plea sets up the defense of usury, and seeks to have credit on the principal for all payments of interest made by appellants on any of said notes.

Replications were filed to said special pleas; a trial was had before the court without a jury, a finding was made in favor of appellee, damages were assessed at $5,244, and an order was made that the judgment entered on September 2nd, 1922, for $5,244, stand as the judgment of the trial court. To reverse said judgment, this appeal is prosecuted.

It is first contended by appellants that the officers of appellee bank had actual knowledge, or that the facts and circumstances in connection with the making of the notes in question were such as to warrant the court in holding said bank and its officers to have had constructive notice of the character of the business being transacted by Kepper, Simpson and Bagby, and that appellee bank, having profited by a diversion made by them of 2½% on the notes sued on, it thereby became a participant in the fruits of said fraud, and by virtue thereof said bank is not entitled to recover any part of the

principal or interest on said notes; in other words, that appellants have a complete defense as to both of said notes.

Fraud is never presumed. It must be affirmatively shown, like any other fact. Wright v. Grover, 27 Ill. 426-430; Boles v. Henney, 32 Ill. 130; People v. Lott, 36 Ill. 447; Carter v. Gunnels, 67 Ill. 270; Schroeder v. Walsh, 100 Ill. 403; Brady v. Cole, 164 Ill. 116-121.

The record in this case, as we view it, wholly fails to sustain said charge of fraud. The evidence is to the effect that appellant Henry Eimers had known Keppel for some time prior to the giving of the notes in question, and prior to the giving of the original notes of which the notes in question were renewals; that he and Albert Eimers, his father, had both purchased stock in said corporation, and had settled for the same, prior to borrowing any moneys of appellee bank with which to purchase, when again solicited for additional stock in said corporation; that when solicited to purchase such additional stock, they stated that they didn't have the money to buy and wouldn't pay a high rate of interest in order to purchase the same; that said agents thereupon left appellants, but returned to them in a few days and stated that they had found a place where they could borrow money at 5%, viz., at appellee bank; that thereupon appellants made application for $5,000 par value of the stock of said corporation; that they went to appellee bank, signed a note payable to said bank, due in six months, for $5,000; that thereupon the cashier of said bank issued a draft payable to appellants for $4,750, which draft appellants endorsed and delivered to Keppel, Simpson and Bagby; that, some five days thereafter, appellants paid said $5,000 note, with the accrued interest.

Appellants further testified that thereafter these same agents again solicited them to buy stock in said corporation, and that they at first were reluctant to do so, but that

principal or interest on said notes; in other words, that appellants have a complete defense as to both of said notes.

Upon the issue is never pre-raised. It must be affirmatively shown, like any other fact. Wright v. Grover, 27 Ill. 488-490; Boles v. Hanney, 32 Ill. 150; Peoples v. Lott, 34 Ill. 444; Carter v. Gunnels, 67 Ill. 270; Schroeder v. Walsh, 190 Ill. 400; Brady v. Cole, 164 Ill. 116-121.

The record in this case, as we view it, wholly fails to sustain said charge of fraud. The evidence is to the effect that appellant Henry Hiners had known Keppel for some time prior to the giving of the notes in question, and prior to the giving of the original notes of which the notes in question were renewals; that he and Albert Hiners, his father, had both purchased stock in said corporation, and had settled for the same, prior to borrowing any money of appellee bank, which to purchase; when again solicited for additional stock in said corporation; that when solicited to purchase such additional stock, they stated that they didn't have the money to buy and wouldn't pay a high rate of interest in order to purchase the same; that said agents thereupon left appellants, but returned to them in a few days and stated that they had found a place where they could borrow money at 8%, viz., at appellee bank; that thereupon appellants made application for $2,000 per on the of the stock of said corporation; that they went to appellee bank, signed a note payable to said bank, due in six months for $2,000; that thereupon the cashier of said bank issued a draft payable to appellants for $4,250, which draft appellants endorsed and delivered to Keppel, Simpson and Rapp; that, some five days thereafter, appellants paid said $2,000 note, with the accrued interest thereon.

Upon cross-examination appellants further testified that thereafter these agents again solicited them to buy stock in said corporation, and that they at first were reluctant to do so, but that

said agents represented to them that they were getting the full amount in preferred stock at par value, and in addition, they were getting a bonus of an equal amount, par value, of the common stock of said corporation; that both the preferred and the common stock would yield them dividends at the rate of 8% per annum; that they thereupon agreed to purchase $7,000 par value of stock; that they went to appellee bank and executed a note to said bank for $3,000; that a draft was issued by said bank for said amount less 2½% discount, or for $7,892.50; that they endorsed said draft and delivered the same to said agents; that thereafter they paid $400 on the principal of said note, reducing the same to $3,500; that said note was renewed from time to time, and that the note for $3,500 sued on in this case is the last of said renewals.

They further testified that thereafter said agents again solicited them to purchase stock, and that they signed an application or contract for $2,000 par value of said stock; that this application was given by them at their home, and that a note was filled out on one of appellee's blanks for $2,000, payable to appellee; that the stock was delivered to appellants and the note was delivered to Keppel, Simpson and Bagby; that said note was taken by said agents to appellee bank, and that said bank issued a draft for $1,950, payable to Keppel, Simpson and Bagby, therefor.

The record discloses that appellee bank had nothing whatever to do with the sale of said stock to appellants. The evidence in the record also wholly fails to show that appellee bank or its officers had any knowledge whatever as to the character of business being transacted by Keppel, Simpson and Bagby. Henry Eimers testified: "He (Duckles, cashier of appellee bank) asked me whether I knew them fellows and I told him I knew Keppel." Said witness was then asked the following questions, and made the answers following the same:

said agents represented to them that they were getting the full amount in preferred stock at par value, and in addition, they were getting a bonus of an equal amount, par value, of the common stock of said corporation; that both the preferred and the common stock would yield them dividends at the rate of 8% per annum; that they thereupon agreed to purchase $5,000 par value of stock; that they went to appellee bank and executed a note to said bank for $3,000; that a draft was issued by said bank for said amount less 2% discount, or for $2,808.50; that they endorsed said draft and delivered the same to said agents; that thereafter they paid $400 on the principal of said note, reducing the same to $2,600; that said note was renewed from time to time, and that the note for $2,600 sued on in this case is the last of said renewals.

[illegible] further testified that thereafter said agents again solicited them to purchase stock, and that they signed an application or contract for $2,000 par value of said stock; that this application was given by them at their home, and that a note was filled out on one of appellee's blanks for $2,000, payable to appellee; that the stock was delivered to appellants and the note was delivered to Kappel, Simpson and Murphy; that said note was taken by said agents to appellee bank and that said bank issued a draft for $1,880, payable to Kappel, Simpson and Murphy, therefor.

The record discloses that appellee bank had nothing whatsoever to do with the sale of said stock to appellants. The evidence in the record also wholly fails to show that appellee bank or its officers had any knowledge whatsoever as to the character of business being transacted by Kappel, Simpson and Murphy. Henry Simons testified: "He (Uberlen, cashier of appellee bank) asked me whether I knew them fellows and I told him I knew Kappel." Said witness was then asked the following questions, and made the answers following the same: "Q. Did you

"Q. Didn't he ask you what the concern was doing, what kind of business?

"A. Yes, sir.

"Q. And didn't you tell him they were making automobile accessories?

"A. Yes, sir."

So that, so far as the evidence is concerned, all the real knowledge that appellee bank had with reference to the business of Keppel, Simpson and Bagby, was derived from appellants. The record further discloses that appellants were relying on their own judgment in reference to the purchase of said stock, and not on anything said or any representations made to them by the officers of appellee bank. We therefore hold the evidence insufficient to support the charge of fraud against appellee bank and its officers, and that the court correctly so found.

As to the defense of usury, we are of the opinion and hold that as to said note of $1,100 and the original note for $2,000, for which said $1,100 note was given as a renewal, the plea is not good. The stock for which said $2,000 note was given was purchased at the home of appellants, and said note for $2,000 was given to Keppel, Simpson and Bagby, in payment therefor. The fact that said parties may have sold or delivered the note to appellee bank for $1,950 would not avail appellants.

As to the note of $3,500, which was a final renewal of the original $3,900 note, the record is different. The $3,900 note was given to appellee bank at its banking house. and the officers of said bank, instead of giving to appellants $3,900 for said note, only gave them $3,808.50; in other words, a discount was made by said bank of 2½% on said note. Said note, by its terms, was to become due in six months. The interest agreed to be paid, of 5% per annum, together with said dis-

"Q. Didn't he ask you what the concern was doing, what kind of business?

"A. Yes, sir.

"Q. And didn't you tell him they were making automobile accessories?

"A. Yes, sir."

So that, so far as the evidence in concerned, all the real knowledge that appellee bank had with reference to the business of Keppel, Simpson and Darby, was derived from appellants. The record further discloses that appellants were relying on their own judgment in reference to the purchase of said stock, and not on anything said or any representations made to them by the officers of appellee bank. We therefore hold the evidence insufficient to support the charge of fraud against appellee bank and its officers, and that the court correctly so found.

As to the defense of usury, we are of the opinion and hold that as to said note of $1,100 and the original note for $2,000, for which said $1,100 note was given as a renewal, the plea is not good. The stock for which said $2,000 note was given was purchased at the home of appellants, and said note for $2,000 was given to Keppel, Simpson and Darby, in payment therefor. The fact that said parties may have sold or delivered the note to appellee bank for $1,950 would not avail appellants.

As to the note of $3,500, which was a final renewal of the original $3,200 note, the record is different. The $3,500 note was given to appellee bank at its banking house, and the officers of said bank, instead of giving to appellants $3,100 for said note, only gave them $3,200.50; in other words, a discount was made by said bank of 2½% on said note. Said note, by its terms, was to become due in six months. The interest agreed to be paid, of 8% per annum, together with said dis-

count, made a total interest at the rate of 10% per annum, which would be usurious under the statute.

Usury is a defense so long as any part of the debt remains unpaid. Harris v. Bressler, 119 Ill. 467; Cobe v. Guyer, 237 Ill. 568-573; Stober v. Ehrhart, 223 App. 543-546.

In Harris v. Bressler, supra, the court at page 472, in discussing the extent to which this rule applies, says:

"In the case of Saylor v. Daniels, 37 Ill. 331, the question made as to usury arose under the act of 1857, and it was there said: 'While it is the rule of this court that usurious interest, once paid voluntarily, cannot be recovered back, yet that rule does not apply when the transaction has not been settled, and the lender brings his action for the recovery of an alleged balance. In such case, the borrower may defend by claiming credit for whatever usurious interest he has paid in the transaction. This is not using the usury law as a sword, but strictly as a shield.' ..... The doctrine of this latter case was approved and restated in Mitchell v. Lyman, 77 Ill. 525, where it was said: 'This court, while deciding that usurious interest, voluntarily paid, cannot be recovered back, holds, still, that so long as any part of the debt remains unpaid, the debtor may insist upon a deduction of all usurious interest paid, therefrom."

And in Cobe v. Guyer, supra, the court at page 573 says:

"Usury in one transaction cannot be availed of in another. But settlement and agreement upon the amount due and the giving of a new note do not preclude the defense of usury existing in the original transaction. So long as any part of the original debt remains unpaid, the debtor may insist upon the deduction of the usury, (Payne v. Newcomb, 100 Ill. 611; Jenkins v. International Bank, 97 id. 568; House v. Davis, 60

count, made a total interest at the rate of 10% per annum, which would be usurious under the statute.

Usury is a defence so long as any part of the debt remains unpaid. Harris v. Brasslar, 110 Ill. 477; Cobb v. Guyer, 227 Ill. 588-575; Stober v. Thebert, 224 App. 442-444.

In Harris v. Brasslar, supra, the court at page 478, in discussing the extent to which this rule applies, says:

"In the case of Saylor v. Danielz, 37 Ill. 321, the question made as to usury arose under the act of 1827, and it was there said: 'While it is the rule of this court that usurious interest, once paid voluntarily, cannot be recovered back, yet that rule does not apply when the transaction has not been settled, and the lender brings his action for the recovery of an alleged balance. In such case, the borrower may defend by claiming credit for whatever usurious interest he has paid in the transaction. This is not using the usury law as a sword, but strictly as a shield.' ..... The doctrine of this latter case was approved and restated in Mitchell v. Lyman, 77 Ill. 326, where it was said: 'This court, while decidtng that usurious interest, voluntarily paid, cannot be recovered back, holds, still, that so long as any part of the debt remains unpaid, the debtor may insist upon a deduction of all usurious interest paid, therefrom."

And in Cobb v. Guyer, supra, the court at page 577

"Usury in one transaction cannot be availed of in another. But settlement and agreement upon the amount due and the giving of a new note do not p ecilude the defense of usury existing to the original transaction. So long as any part of the original debt remains unpaid, the debtor may insist upon the deduction of the usury. (Payne v. Wescott, 100 Ill. 611; Jenkins v. International Bank, 7 Id. 588; House v. David, 80

id. 367;) and only the balance of the principal remaining after the application on the principal of all payments, whether of principal or interest, can be recovered. (Harris v. Bressler, 119 Ill. 467.)"

It is contended on the part of appellee that the question of usury cannot be raised in this case, for the reason that appellants submitted no propositions of law. This point is not well taken. The fourth plea raises the issue of usury, and as the record clearly discloses that usurious interest was paid on said note of $3,500, being the final renewal of the $3,900 note, it is the duty of this court to so hold, even though no propositions of law were submitted. P. C. C. & St. L. Ry. Co. v. Chicago Ry. Co., 300 Ill. 162; Cohn v. Armstrong Tire & Vulcanizing Co., 222 App. 572-574.

The record discloses that $317.82 was paid as interest on the $3,900 note and the renewals thereof. Appellants would therefore be entitled to a credit for the amount of said interest. The judgment in this case will be affirmed, provided appellee enters a remittitur of said amount of $317.82 within twenty days from the filing of this opinion. Otherwise, the judgment will be reversed and the cause will be remanded.

Not to be reported

Id. 367;) and only the balance of the principal remaining after the application on the principal of all payments, whether of principal or interest, can be recovered. (Harris v. Breasler, 119 Ill. 447.)"

It is contended on the part of appellee that the question of usury cannot be raised in this case, for the reason that appellants submitted no propositions of law. This point is not well taken. The fourth plea raises the issue of usury, and as the record clearly discloses that usurious interest was paid on said note of $3,500, being the final renewal of the $3,000 note, it is the duty of this court to so hold, even though no propositions of law were submitted. P. C. C. & St. L. Ry. Co. v. Chicago Ry. Co., 200 Ill. 162; Cohn v. Automobile Tire & Vulcanizing Co., 222 App. 572-574.

The record discloses that $417.82 was paid as interest on the $3,500 note and the renewals thereof. Appellants would therefore be entitled to a credit for the amount of said interest. The judgment in this case will be affirmed, crediting appellee entire remittitur of said amount of $417.82 within twenty days from the filing of this opinion. Otherwise, the judgment will be reversed and the cause will be remanded.

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Term No. 36 Agenda No. 36

In The

APPELLATE COURT OF ILLINOIS.

Fourth District.

OCTOBER TERM, A. D. 1926

FRANCES VOLLUZ, Appellee,	)	Appeal from the
-vs-	)	City Court of
MAY E. McGEE, Appellant.	)	East St. Louis.

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244 I.A. 662

OPINION by BOGGS, J.

An action in assumpsit was instituted by appellee against appellant in the city court of East St. Louis to recover the amount which she had paid on a certain contract for the sale to her by appellant of certain real estate. The declaration consisted of the common counts, to which was filed a plea of the general issue. A trial was had, resulting in a verdict and judgment in favor of appellee for the sum of $315. To reverse said judgment, this appeal is prosecuted.

It is first contended by appellant that no recovery can be had in this character of case on a declaration consisting of the common counts.

We do not deem this point well taken, for the reason that, on appellee's theory of the case, which the jury evidently adopted, she was seeking a recovery of liquidated damages.

Term No. 36 Agenda No. 24

In The

APPELLATE COURT OF ILLINOIS.

Fourth District.

OCTOBER TERM, A. D. 1924

FRANKLIN VOLINE,

Appellee,

-vs-

MAY E. MOGEE,

Appellant.

Appeal from the City Court of East St. Louis.

OPINION by DOBSON, J.

An action in assumpsit was instituted by appellee against appellant in the city court of East St. Louis to recover the amount which she had paid on a certain contract for the sale to her by appellant of certain real estate. The declaration consisted of the common counts, to which was filed a plea of the general issue. A trial was had, resulting in a verdict and judgment in favor of appellee for the sum of $215. To reverse said judgment, this appeal is prosecuted.

It is first contended by appellant that no recovery can be had in this character of case on a declaration containing of the common counts.

We do not deem this point well taken, for the reason that, on appellee's theory of the case, which the jury evidently adopted, she was seeking a recovery of liquidated damages,

That being true, a recovery could be had under the common counts. Concord Apartment House Co. v. O'Brien, 228 Ill. 360-367; Metal Fireproof Co. v. Boyce, 233 Ill. 284-288.

It is also contended by counsel for appellant that the verdict of the jury is against the manifest weight of the evidence.

It is conceded that appellant, through her husband, H. J. McGee, sold appellee certain real estate for the agreed price of $4,975; that appellee made a cash payment on said contract of $300, and that the contract provided that she should pay $75 per month thereafter; that she paid the first $75, but afterward, by agreement between appellee and appellant, acting through her husband, H. J. McGee, payments of $50 were made by appellee and were accepted by appellant on said contract. The testimony on the part of appellant is to the effect that appellee paid $625 on said contract. Appellee testified that she made two payments of $50 each for which she did not get a receipt.

Appellee's testimony with reference to the alleged agreement between herself and appellant, made through appellant's husband, H. J. McGee, is as follows:

"On the 18th of August (1925) I was sick in bed and Mr. McGee came to my house, and my little girl went to the door; heasked where I was and she said, 'Mother is sick in bed.' He said, 'Fannie'--he never called me Mrs. Volluz; he always called me Fannie--he said, 'Fannie, you can't keep the payments up on this house; I have got this house sold, and when I sell this house I will make an agreement to pay you back what you will have on the house here as soon as those other people get in the house.' I said, 'All right, I will get out as soon as I will be up.' I was in bed from the 18th of August to the 12th of September and he kept coming from day to day; he sold the house to some people by the name of Strecker; they moved

That being true, a recovery could be had under the common counts. Concord Apartment House Co. v. O'Brien, 298 Ill. 360-367; Metal Pipecoat Co. v. Boyce, 222 Ill. 294-298.

It is also contended by counsel for appellant that the verdict of the jury is against the manifest weight of the evidence.

It is conceded that appellant, through her husband, H. J. Modee, sold appellee certain real estate for the agreed price of $4,275; that appellee made a cash payment on said contract of $800, and that the contract provided that she should pay $75 per month thereafter; that she paid the first $75, but afterward, by agreement between appellee and appellant, acting through her husband, H. J. Modee, payments of $50 were made by appellee and were accepted by appellant on said contract. The testimony on the part of appellant is to the effect that appellee paid $225 on said contract. Appellee testified that she made two payments of $50 each for which she did not get a receipt.

Appellee's testimony with reference to the alleged agreement between herself and appellant, made through appellant's husband, H. J. Modee, is as follows:

"On the 18th of August (1923) I was sick in bed and Mr. Modee came to my house, and my little girl went to the door; hearing where I was and she said, 'Mother is sick in bed.' He said, 'Fannie'--he never called me Mrs. Vollus; he always called me Fannie--he said, 'Fannie, you can't keep the payments up on this house; I have got this house sold, and when I sell this house I will make an agreement to pay you back what will have on the house here as soon as those other people get in the house.' I said, 'All right, I will get out as soon as I will be up.' I was in bed from the 18th of August to the 12th of September and he kept coming from day to day: he sold the house to some people by the name of Stroeker; they moved

into the house the Saturday after I got out. I called Mrs. McGee during that time and she said, 'I want you to get out of the house, and Mr. McGee will settle it with you.' I left with that understanding."

On cross examination appellee testified, among other things:

"He said, 'Fannie, I don't think you can keep up your payments. I have this house sold and I want you to get out. When I sell this house I will refund some of your money back to you.' I said, 'All right, Mr. McGee, I will get out.' He said he would refund some of it back. I didn't expect him to refund all my money. I expected to pay rent."

Grace Volluz, the daughter of appellant, among other things, testified:

"I heard a conversation between my mother and Mr. McGee with reference to her leaving that house. Mr. McGee said he wanted us to get out; that he had already sold the house. I don't remember anything else."

On the other hand, H. J. McGee denied having made any agreement to refund to appellee the whole or any part of the funds which she had paid on said contract, but stated that he put appellee out of possession of said premises by process of law. Appellant testified that she never said to appellee that her husband would settle with her (appellee).

The evidence was therefore conflicting as to whether or not appellant promised to pay appellee the whole or a part of the funds which she had paid on the purchase price of said premises. The record discloses that the verdict is for only $315, and according to appellant's testimony, appellee had paid in $625, and according to appellee's testimony she had paid in about $725. It therefore clearly appears that the jury were intending to credit appellant with either the rental value of said premises or interest on the purchase price for the period

into the house the Saturday after I got out. I called Mr. Mogee during that time and she said, 'I want you to get out of the house, and Mr. Mogee will settle it with you.' I left with that understanding."

On cross examination appellee testified, among other things:

"He said, 'Fannie, I don't think you can keep up your payments. I have this house sold and I want you to get out. When I sell this house I will refund some of your money back to you.' I said, 'All right, Mr. Mogee, I will get out.' He said he would refund some of it back. I didn't expect him to refund all my money. I expected to pay rent."

Grace Volius, the daughter of appellant, among other things, testified:

"I heard a conversation between my mother and Mr. Mogee with reference to her leaving that house. Mr. Mogee said he wanted us to get out; that he had already sold the house. I don't remember anything else."

On the other hand, H. L. Mogee denied having made any agreement to refund to appellee the whole or any part of the funds which she had paid on said contract, but stated that he put appellee out of possession of said premises by process of law. Appellant testified that she never said to appellee that her husband would settle with her (appellee).

The evidence was therefore conflicting as to whether or not appellant promised to pay appellee the whole or a part of the funds which she had paid on the purchase price of said premises. The record discloses that the verdict is for only $315, and according to appellant's testimony, appellee had paid in $625, and according to appellee's testimony she had paid in about $725. It therefore clearly appears that the jury were intending to credit appellant with either the rental value of said premises or interest on the purchase price for the period

during which appellee had possession of the same, the testimony being to the effect that she went into possession of said premises on September 19th, 1924, and that she moved out of the same on September 19th, 1925.

Unless we can say that the verdict of the jury was against the manifest weight of the evidence, we would not be justified in reversing the judgment on that ground. Snodgrass v. City of Chicago, 152 Ill. 600-605; Flynn v. Chicago City Ry. Co., 153 App. 405-407; Tennicot v. Donk Bros., 158 App. 549.

Counsel for appellant also contends that, if it be conceded that appellant, through her said husband, offered to refund the money paid by appellee, there was no consideration for such offer or promise, for the reason that appellee was being dispossessed through forcible entry and detainer proceedings. In order to substantiate that claim, appellant must have made proof by competent, record evidence that she had a valid and subsisting judgment for possession against appellee, and that she was dispossessed by virtue thereof. No such proof was made.

No instructions were given on the part of appellee. There is no serious complaint made by counsel for appellant as to the rulings of the court on the evidence. The verdict, on any theory of the case, is not excessive.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported

during which appellee had possession of the same, the testimony being to the effect that she went into possession of said premises on September 10th, 1924, and that she moved out of the same on September 10th, 1925.

Unless we can say that the verdict of the jury was against the manifest weight of the evidence, we would not be justified in reversing the judgment on that ground. Woodmansee v. City of Chicago, 189 Ill. 600-605; Wynn v. Chicago City Ry. Co., 158 App. 105-107; Peppicot v. Dodge Bros., 158 Ann. 240.

Counsel for appellant also contends that, if it be conceded that appellant, through her said husband, offered to refund the money [illegible] for such offer or promise, for the reason that appellee was being dispossessed through forcible entry and detainer proceedings. In order to substantiate that claim, appellant must have made proof by competent, record evidence that she had a valid and subsisting judgment for possession against appellee, and that she was dispossessed by virtue thereof. No such proof was made.

No instructions were given on the part of appellant. There is no serious complaint made by counsel for appellant as to the rulings of the court on the evidence. The verdict, on any theory of the case, is not excessive.

For the reasons above set forth, the judgment of the trial court will be affirmed.

3842

Term No. 39 Agenda No. 42

In The

APPELLATE COURT OF ILLINOIS,

Fourth District.

OCTOBER TERM, A. D. 1926

ROBERT L. PATTON, Appellant,	)	Appeal from the
-vs-	)	Lawrence County
SAVILLA SHIPMAN, Appellee.	)	Circuit Court

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244 I.A. 662 3

OPINION by BOGGS, J.

On March 2nd, 1920, appellant caused judgment by confession to be entered against appellee in vacation after the February term of the circuit court of Lawrence county, on two promissory notes, one of said notes being dated June 30th, 1919, for $5,873.18, due in six months, the other of said notes being for $3,823.31, dated June 18th, 1919, due in six months, both of said notes being signed by appellee and payable to the Bridgeport State Bank.

On March 20th, 1920, on motion of appellee, leave was given to him to plead in each of said causes, the judgments to stand as a lien. Thereafter, at the May term, 1925, of said court, said causes were consolidated. To the declarations in said causes as consolidated, appellee filed a plea of non assumpsit and six special pleas, which said special pleas were

Term No. 39 Agenda No. 42

In The

SUPREME COURT OF ILLINOIS,

Fourth District.

OCTOBER TERM, A. D. 1928

ROBERT L. PATTON, Appellant,	Appeal from the
-vs-	Lawrence County
SAVILLA SHIPMA, Appellee.	Circuit Court.

OPINION by SOMMER, J.

On March 2nd, 1920, a mortgagor caused judgment by confession to be entered in that appellee in vacation after the January term of the circuit court of Lawrence County, on two promissory notes, one of said notes being dated June 20th, 1919, for $5,875.18, due in six months, the other of said notes being for $[illegible], dated June 18th, 1919, due in six [illegible], both of said notes being signed by appellee and payable [illegible] Farmers State Bank.

On March 20th, [illegible] on motion of appellee, leave was given to him to plead in each of said causes, the judgments to stand as a lien. Thereafter, at the May term, 1928, of said court, said causes were consolidated. To the declarations in said causes as consolidated appellee filed a plea of non assumpsit and six special pleas, which said special pleas were

afterward withdrawn, and a stipulation was entered into to the effect that any defense proper under any special pleas might be offered under the plea of the general issue. A trial was had, resulting in a verdict and judgment in favor of appellee. To reverse said judgment, this appeal is prosecuted.

It is first contended by appellant that the court erred in refusing his motion made at the close of all the evidence, to direct a verdict in his favor. As there is no serious conflict on the material facts in controversy, said motion raises a question of law, on the determination of which depends the right of recovery in this case.

In October, 1918, appellee owed the Bridgeport State Bank approximately $12,000, represented by two notes, of which the notes here in controversy were final renewals and balances on certain other notes owing said bank. The record tends to show that at this time appellee was in straitened circumstances financially, and that he contemplated taking the benefit of the bankruptcy law. T. M. Mooney, the then cashier of said bank, proposed to appellee that if he would pay 10% on his indebtedness, that he would release him from all his liabilities to said bank. Appellee acquiesced therein, and delivered to Mooney his personal check for $1,200, which said check was paid in due course. Thereupon Mooney executed and delivered to appellee the following receipt:

"Bridgeport, Illinois, Oct. 9, 1918.

"RECEIVED OF Savilla Shipman $1200.00

Twelve Hundred & no/100 ---- Dollars.

In full settlement and discharge of all liabilities of myself individually to the Bridgeport State Bank. Notes to be taken up as soon as ultimately paid.

"T. M. Mooney,

Cashier Bridgeport State Bank."

wiseward wit drawn, and a stipulation was entered into to the effect that any defense proper under any special pleas might be offered under the plea of the general issue. A trial was had, resulting in a verdict and judgment in favor of appellee. To reverse said judgment, this appeal is prosecuted.

It is first contended by appellant that the court erred in refusing his motion made at the close of all the evidence, to direct a verdict in his favor. As there is no serious conflict on the material facts in controversy, said motion raises a question of law, on the determination of which depends the right of recovery in this case.

In October, 1913, appellee owed the Bridgeport State Bank approximately $12,000, represented by two notes, of which the notes here in controversy were final renewals and balances on certain other notes owing said bank. The record tends to show that at this time appellee was insolvent and [illegible] financially, and that he contemplated taking the benefit of the bankruptcy law. T. W. Mooney, the then cashier of said bank, proposed to appellee that if he would pay 10% on his debtedness, that he would release him from all his liabilities to said bank. Appellee acquiesced therein, and delivered to Mooney his personal check for $1,200, which said check was paid in due course. Thereupon Mooney executed and delivered to appellee the following receipt:

"Bridgeport, Illinois, Oct. , 1913.

"RECEIVED OF Savilla Shipman $1200.00

Twelve Hundred & no/100 ---- Dollars.

In full settlement and discharge of all liability of myself individually to the Bridgeport State Bank. Notes to be taken up as soon as ultimately paid.

"T. W. Mooney,

Cashier Bridgeport State

W. W. Arnold, attorney for appellee and a witness in his behalf, testified that at the time of said transaction, Mooney said to appellee that "he felt a moral obligation to not let the bank lose any money by any obligations growing out of this, and he asked Mr. Shipman to let him hold those notes there in the bank and he said he would take them up personally, and at Mr. Shipman's direction I finally turned the notes back to Mr. Mooney."

On December 26th, 1918, at Mooney's request, appellee renewed said notes, the accrued interest being added to the principal. At that time a receipt was executed by Mooney to appellee, reciting the giving of said last mentioned notes, and containing among other things this recital: "That there is no personal liability of said Sevilla Shipman for payment of said notes, ... that the same are renewed so that they may be carried along by said bank to enable the undersigned to pay and satisfy the same."

Said notes were again renewed by appellee, one note being dated June 13th, 1919, for $3,323.21, and the second dated June 30th, 1919, for $5,377.18, both due six months after their respective dates; the last mentioned notes being the notes on which judgments were confessed herein.

In September, 1919, the state auditor's office required the directors of said bank to take up certain notes of said bank, aggregating $137,153.53, claimed by said office to be worthless, among which were the two notes here in controversy. Thereupon, in September, 1919, certain of said directors took up said notes and executed their own notes to the bank for a like amount in payment therefor. Thereafter, at a regular meeting of said directors and prior to the maturity of said notes, it was ordered that said notes, with others, be by the cashier endorsed to Robert L. Patton, plaintiff in this case, who was to hold the same as trustee for the directors so taking

Mr. W. Arnold, attorney for appellee and a witness in his behalf, testified that at the time of said transaction, Mooney said to appellee that "he felt a moral obligation to put let the bank lose any money by any obligations growing out of this, and he asked Mr. Shipman to let him hold those notes there in the bank and he said he would take them up personally, and at Mr. Shipman's direction I finally turned the notes back to Mr. Mooney."

On December 26th, 1912, at Mooney's request, appellee renewed said notes, the accrued interest being added to the principal. At that time a receipt was executed by Mooney to appellee, reciting the giving of said last mentioned notes, and containing among other things this recital: "That there is no personal liability of said Sevilla Shipman for payment of said notes, ... that the same are renewed so that they may be carried along by said bank to enable the undersigned to pay and satisfy the same."

Said notes were again renewed by appellee, one note being dated June 12th, 1913, for $3,052.91, and the second dated June 30th, 1913, for $3,[illegible].18, both due six months after their respective dates; the last mentioned notes being the notes on which judgments were confessed herein.

In September, 1913, the state auditor's office required the directors of said bank to take up certain notes of said bank, aggregating $127,152.22, claimed by said office to be worthless, among which were the two notes here in controversy. Thereupon, in September, 1913, certain of said directors took up said notes and executed their own notes to the bank for a like amount in payment therefor. Thereafter, at a regular meeting of said directors and prior to the maturity of said notes, it was ordered that said notes, with others, be by the cashier endorsed to Robert L. Patton, plaintiff in this case, who was to hold the same as trustee for the directors on taking

the same up. The record wholly fails to disclose that the board of directors, as a board or as individuals, had any notice whatever of the purported compromise of the indebtedness owing by appellee to said bank, until January 1920.

It is insisted on the part of counsel for appellee that T. M. Mooney as cashier of the bank, and as executive officer thereof, was fully authorized to compromise said indebtedness without any express authority and without any knowledge on the part of the board of directors.

Without going into a detailed discussion of this question, we are inclined to the opinion that a cashier of a bank should not be held to have authority, without the direction, knowledge or acquiescence of the board of directors, to make compromises of this character, which if repeated three or four times would deplete the capital stock. 3 R.C.L. 448-449. It is not necessary, however, for us to base our decision on that proposition alone. The record discloses that appellee, after the alleged compromise agreement was entered into, permitted the two notes to remain with said bank as a part of its assets. On maturity of said notes, appellee twice renewed the same, and in each instance increased the amount of said respective notes by the amount of the then accrued interest. These notes were in the bank as a part of its assets, and appellee had knowledge that this was true, as disclosed by the second receipt which he took from the cashier, which contains this recital: "The notes herein above referred to as being this day executed, to be held by the Bridgeport State Bank and not negotiated or transferred."

Even though it be conceded that the cashier of said

the same up. The record wholly fails to disclose that the board of directors, as a board or as individuals, had any notice whatever of the purported compromise of the indebtedness owing by appellee to said bank, until January 1920.

It is insisted on the part of counsel for appellee that T. M. Mooney as cashier of the bank, and as executive officer thereof, was fully authorized to compromise said indebtedness without any express authority and without any knowledge on the part of the board of directors.

Without going into a detailed discussion of this question, we are inclined to the opinion that a cashier of a bank should not be held to have authority, without the direction, knowledge or acquiescence of the board of directors, to make compromises of this character, which if repeated three or four times would deplete the capital stock. 3 R.C.L. 448-449. It is not necessary, however, for us to base our decision on that proposition alone. The record discloses that appellee, after the alleged compromise agreement was entered into, permitted the two notes to remain with said bank as a part of its assets. On maturity of said notes, appellee twice renewed the same, and in each instance increased the amount of said respective notes by the amount of the then accrued interest. These notes were in the bank as a part of its assets, and appellee had knowledge that this was true, as disclosed by the second receipt which he took from the cashier, which contains this recital: "The notes herein above referred to as being this day exchanged, to be held by the Hagerman State Bank and not negotiated or transferred."

Even though it be conceded that the cashier of said

bank had the right to compromise with appellee as claimed by him, yet appellee, by reason of having allowed his notes to remain with said bank as a part of its assets, and having renewed the same on two different occasions, increasing the amount of the principal by the accrued interest thereon, is not in a position now to claim the benefit of said compromise as against the holder of said notes, who paid full consideration therefor in ignorance of any infirmity or defense to said notes.

It is contended by appellee that the bank in this case could not have collected the notes in question, and that therefore appellant as the assignee of said notes cannot collect the same.

At the time the two notes here involved were executed by appellee and delivered to said bank, no receipt or other written memorandum was given by said cashier to appellee. The notes, as the record discloses, were held as a part of the assets of said bank, and there is nothing tending to impeach their validity except the testimony of appellee and of W. W. Arnold, his attorney, and the fact that the same were given in final renewal of the other notes, which appellee insists were compromised.

The law is that the maker of a note cannot, by parol testimony, vary the terms of the written contract, viz., the provisions of the note. Mosher v. Rogers, 115 Ill. 446; Murchie v. Peck Bros. & Co., 160 Ill. 175-177; Hensley v. Mitchell, 147 App. 161-162; Bank of United States v. Dunn, 6 Pet. 51, 8 L. Ed. 316.

In Murchie v. Peck Bros. & Co., supra, the court at page 177 in discussing this question says:

"The second defense sought to be set up was an alleged agreement, by which the note was not to be paid according to its terms, but its payment was made by such agreement depend-

bank had the right to compromise with appellee as claimed by him, yet appellee, by reason of having allowed his notes to remain with said bank as a part of its assets, and having renewed the same on two different occasions, increasing the amount of the principal by the accrued interest thereon, is not in a position now to claim the benefit of said compromise as against the maker of said notes, who paid full consideration therefor in ignorance of any infirmity or defense to said notes.

It is contended by appellee that the bank in this case could not have collected the notes in question, and that therefore appellant as the assignee of said notes cannot collect the same.

At the time the two notes here involved were executed by appellee and delivered to said bank, no receipt or other written memorandum was given by said cashier to appellee. The notes, as the record discloses, were held as a part of the assets of said bank, and there is nothing tending to impeach their validity except the testimony of appellee and of W. Arnold, his attorney, and the fact that the same were given in final renewal of the other notes, which appellee testifies were compromised.

The law is that the maker of a note cannot, by parol testimony, vary the terms of the written contract, viz., the provisions of the note. [illegible] 11- 177. cde; Dunnable v. [illegible] Bros. [illegible] Co., 160 Il. 174-177; Sparkes v. [illegible], 147 App. 181-182; [illegible] of United States v. Dunn, 6 Pet. [illegible] 8 L. Ed. 316.

In Mu[illegible] v. Peck Bros. [illegible] Co., [illegible], the court at [illegible] 177 in discussing this question says:

"The second defense sought to be set up was an [illegible]

[illegible] to its terms, but its payment was made [illegible] agreement depri-

ent upon a sale of certain property by the makers of the note. To this proof, objection was sustained. This was no more than an offer to prove a parol agreement inconsistent with the note. A note cannot be contradicted or varied by a previous or contemporaneous verbal agreement, and it was not error to exclude such proof." Citing Yager v. Hutchinson, 2 Gilm. 266; Warlow v. Boswell, 15 Ill. 56.

That the title to the notes in question passed to appellant by the endorsement of said cashier, and that he was a holder in due course, is amply sustained by the case of Patton v. Young, 233 App. 515-519, being a case where the question directly arose as to whether a certain note endorsed by the cashier of this same bank to appellant passed the title thereto, the defense being that there was no consideration for the giving of the same to said bank. This court there held that the directors of said bank, for whom Patton was acting as trustee, having had no notice of the want of consideration, the title passed to said trustee and that he was entitled to recover on the same against the maker of said note, even though said maker received no actual consideration therefor. See Cahill's statutes, chap. 98, p. 52, as to what constitutes a holder in due course.

It is also insisted by appellee that notice to the cashier of said bank of the compromise purported to have been made by him with appellee, was notice to the directors of said bank, and that said directors and appellant, who is acting as trustee for them, are not in a position to say that they had no notice of such compromise.

In addition to what we have already said in this connection, it is to be observed that, while ordinarily notice to the officers of a corporation is notice to the corporation and its directors, this rule does not obtain where the officer is individually interested in the transaction in question. Seaverns

ent upon a sale of certain property by the makers of the note. To this proof, objection was sustained. This was no more than an offer to prove a parol agreement inconsistent with the note. A note cannot be contradicted or varied by a previous or contemporaneous verbal agreement, and it was not error to exclude such proof." Citing Yager v. Hutchinson, 4 Ill. App. 129; Bayley v. Cowell, 15 Ill. 86.

That the title to the notes in question passed to appellant by the endorsement of said banker, and that he was a holder in due course, is amply sustained by the case of Patton v. Young, 223 App. 416-419, being a case where the question directly arose as to whether a certain note endorsed by the cashier of this same bank to appellant passed the title thereto, the defense being that there was no consideration for the giving of the same to said bank. The court there held that the directors of said bank, for whom Patton was acting as trustee, having had no notice of the want of consideration, the title passed to said trustee and that he was entitled to recover on the same against the maker of said note, even though said maker received no actual consideration therefor. See Camill's Statutes, chap. 98, p. 82, as to what constitutes a holder in due course.

It is also insisted by appellee that notice to the cashier of said bank of the compromise purported to have been made by him with appellee, was notice to the directors of said bank, and that said directors and appellant, who is acting as trustee for them, are not in a position to say that they had no notice of such compromise.

In addition to what we have already said in this connection, it is to be observed that while ordinarily notice to the officers of a corporation is notice to the corporation and its directors, this rule does not obtain where the officer is individually interested in the transaction in question. Searvers

v. Presbyterian Hospital, 173 Ill. 414; Wheeler v. Home Savings Bank, 188 Ill. 34; Higgins v. Langsingh, 154 Ill. 301-307; Hanneken v. Sheaff, 226 App. 363.

In Seaverns v. Presbyterian Hospital, supra, the court in discussing this question at page 420, says:

"On principles of public policy, the knowledge of the agent is imputed to the principal. But the rule does not apply to transactions such as that under consideration (the president selling to the company), for in such a transaction the officer, in making the sale or conveyance, stands as a stranger to the company. (Stratton v. Allen, 1 C. E. Green, 220.) His interest is opposed to theirs, and the presumption is, not that he will communicate his knowledge of any secret infirmity of the title to the corporation, but that he will conceal it."

In this case, Mooney informed appellee and his counsel at the time of said alleged compromise, that he felt that the notes should be paid, and that he himself would undertake to pay them. This clearly indicated that Mooney desired to have the notes left with the bank as a part of its assets, and that, for some reason in connection with the taking of said notes, he felt that, as between himself and the bank, he should make the notes good, and of this appellee was well advised.

It is insisted on the part of counsel for appellee that appellant is seeking to recover the full amount of said notes, without giving credit for the $1,200 paid by appellee thereon. The record discloses that the check given by appellee was not made to the bank or to T. M. Mooney as cashier, but to T. M. Mooney. There is nothing in the record to show that the proceeds of this check passed into the assets of the bank. The record further discloses that appellee, when he left the notes that were in existence at the time of said alleged compromise with the bank, did not require that any endorsement of the $1,200 paid by him should be entered on said notes as a credit,

4. Presbyterian Hospital, 176 III. 414; Wheeler v. Home Savings Bank, 124 III. 54; Hiemig v. Latting, [illegible]; Thompson v. Sheaff, 226 App. 368.

In Seaverns v. Presbyterian Hospital, supra, the court in discussing this question at page 420, says:

"On principles of public policy, the knowledge of the agent is imputed to the principal. But the rule does not apply to transactions such as that under consideration (the president selling to the company), for in such a transaction the officer, in making the sale or conveyance, stands as a stranger to the company. (Stratton v. Allen, 1 D. Z. Green, 220.) The interest is opposed to theirs, and the presumption is, not that he will communicate his knowledge of any secret infirmity of the title to the corporation, but that he will conceal it."

In this case, Mooney introduced appellee and his counsel at the time of said alleged compromise, that he felt that the notes should be paid, and that he himself would undertake to pay them. This clearly indicated that Mooney desired to have the notes left with the bank as a part of its assets, and that, for some reason in connection with the taking of said notes, he felt that, as between himself and the bank, he should make the notes good, and of this appellee was well advised.

It is insisted on the part of counsel for appellee that appellant is seeking to recover the full amount of said notes, without giving credit for the $1,200 paid by appellee thereon. The record discloses that the check given by appellee was not made to the bank or to T. M. Mooney as cashier, but to T. M. Mooney. There is nothing in the record to show that the proceeds of this check passed into the assets of the bank. The record further discloses that appellee, when he left the notes that were in existence at the time of said alleged compromise with the bank, did not require that any endorsement of the $1,200 paid by him should be entered on said notes as a credit,

and in renewing said notes, he renewed the same for the full amount of the principal. with the interest added from time to time. He is therefore not in a position to claim credit for the $1,200 so paid by him to Mooney.

Errors were assigned on the rulings of the court on the instructions, but in our view of the case it will not be necessary for us to discuss the same.

The questions involved in this case are questions of law, and if we are correct in our holding as above set forth, the court should have directed a verdict in favor of appellant. That being true, there is no occasion for remanding this case, and judgment will therefore be entered in this court, confirming the judgment originally entered by confession on said notes, at the cost of appellee.

Original judgment confirmed.

Not to be reported

and in renewing said notes, he renewed the same for the full amount of the principal, with the interest added from time to time. He is therefore not in a position to claim credit for the $1,200 so paid by him to Moores.

Errors were assigned on the rulings of the court on the instructions, but in our view of the case it will not be necessary for us to discuss the same.

The questions involved in this case are questions of law, and if we are correct in our holding as above set forth, the court should have directed a verdict in favor of appellant. That being true, there is no occasion for remanding this case, and judgment will therefore be entered in this court, confirming the judgment originally entered by confession on said notes, at the cost of appellee.

Original judgment confirmed.

Term No. 50 Agenda No. 30

In The

APPELLATE COURT OF ILLINOIS,

Fourth District.

OCTOBER TERM, A. D. 1926

JOHN DUFFNER, Appellee,	)	
-vs-	)	Appeal from the City Court of Granite City.
CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Appellant.	)	

OPINION by BOGGS, J.

On December 14th, 1924, appellee, while driving a Ford coupe on Pacific avenue in Granite City, was struck by a freight train of appellant, his automobile was seriously damaged, and he sustained personal injuries from which he had not entirely recovered at the time of the trial. Suit was instituted by appellee in the city court of Granite City to recover for said injuries.

The declaration as finally amended consisted of three counts, and charged the negligent operation of appellant's said train through Granite City and across Pacific avenue at a high, dangerous and excessive rate of speed: the negligent failure to ring a bell or sound a whistle as required by statute; that appellant undertook to furnish a watchman at the Pacific avenue crossing where said collision occur-

Term No. 80 Agenda No. 20

In The

APPELLATE COURT OF ILLINOIS,

Fourth District.

OCTOBER TERM, A. D. 1924

JOHN DUFFNER, Appellee,	Appeal from the City Court of Granite City.
-vs-	
CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Appellant.	

OPINION by BOGGS, J.

On December 14th, 1924, appellee, while driving a Ford coupe on Pacific avenue in Granite City, was struck by a freight train of appellant, his automobile was seriously damaged, and he sustained personal injuries from which he had not entirely recovered at the time of the trial. Suit was instituted by appellee in the city court of Granite City to recover for said injuries.

The declaration as finally amended consisted of three counts, and charged the negligent operation of appellant's said train through Granite City and across Pacific avenue at a high, dangerous and excessive rate of speed; the negligent failure to ring a bell or sound a whistle as required by statute; that appellant undertook to furnish a watchman at the Pacific avenue crossing where said collision occur-

red, and that on the day in question, as appellee was approaching said crossing, said watchman negligently failed to warn him of the approach of said train, whereby said collision occurred, resulting in the injuries sued for. All of said counts alleged that, just prior to and at the time of said collision, appellee was in the exercise of due care for his own safety. To said declaration appellant filed a plea of the general issue, and a trial was had, resulting in a verdict and judgment in favor of appellee for the sum of $1,000. To reverse said judgment, this appeal is prosecuted.

The principal ground relied on by appellant for a reversal of said cause is that appellee was not in the exercise of due care for his own safety just prior to and at the time of said accident.

Pacific avenue on the west, and Niedringhaus avenue on the east of the hereinafter mentioned tracks, form one continuous street, running practically across said entire city, and is a much traveled street. Said street or avenue is crossed at right angles by some sixteen or eighteen railroad tracks, which run parallel to each other and occupy a space of some 200 or 300 feet east and west. The first six tracks on the west are not used, and were referred to as dead tracks. the other tracks consist of the main lines of the Wabash, Burlington, Big Four, C. & E. I., and the C. & A. railroads. The Wabash has the most easterly of the tracks; the C. & A. the most westerly. The Big Four and Alton trains use the C. & A. tracks going into St. Louis, and the Big Four tracks coming out. At the time of the injury the Big Four train was running on the C. & A. track, which was the cause of some confusion in the testimony, some of the witnesses referring to the C. & A. track as the Big Four track, and vice versa.

With reference to obstructions to the view looking north as one approached said crossing, appellee testified:

red, and that on the day in question, as appellee was approaching said crossing, said watchman negligently failed to warn him of the approach of said train, whereby said collision occurred, resulting in the injuries sued for. All of said counts alleged that, just prior to and at the time of said collision, appellee was in the exercise of due care for his own safety. To said declaration appellant filed a plea of the general issue, and a trial was had, resulting in a verdict and judgment in favor of appellee for the sum of $1,000. To reverse said judgment, this appeal is prosecuted.

The principal ground relied on by appellant for a reversal of said cause is that appellee was not in the exercise of due care for his own safety just prior to and at the time of said accident.

Pacific avenue on the west, and Midwinghaus avenue on the east of the hereinafter mentioned tracks, form one continuous street, running practically across said entire city, and is a much traveled street. Said street or avenue is crossed at right angles by some sixteen or eighteen railroad tracks, which run parallel to each other and occupy a space of some 800 or 900 feet east and west. The first six tracks on the west are not used, and were referred to as dead tracks; the other tracks consist of the main lines of the Wabash, Burlington, Big Four, C. & E. I., and the C. & A. railroads. The Wabash has the most easterly of the tracks; the C. & A. the most westerly. The Big Four and Alton trains use the C. & A. tracks going into St. Louis, and the Big Four tracks coming out. At the time of the injury the Big Four train was running on the C. & A. track, which was the cause of some confusion in the testimony, some of the witnesses referring to the C. & A. track as the Big Four track, and *vice versa*.

With reference to obstructions to the view looking north as one approached said crossing, appellee testified:

"As you approach this track from the west there is a big plant on the left hand side, called the American Steel Foundry. After you get east of that you find a building 20 or 25 feet wide and about 100 feet long, of Reimer's Coal & Feed Company. The next building is the Terminal freight house--about 20 or 25 feet wide and 90 to 100 feet long. Its length extends parallel with the tracks, and the track is about 30 feet east of the east side of the building."

W. S. Gray, a watchman for the Wabash railroad at said crossing, a witness on behalf of appellant, testified: "The Terminal has a building west of the west rail of the track on which this train was coming. There is about 20 feet free space between the Terminal building and the west rail."

Appellee testified that on the day in question, as he approached said crossing, he was driving about 20 miles per hour, and that when he got about 30 or 40 feet from the track in question he came "almost to a complete stop." He further testified: "I looked to the south and to the north, but you can't see nothing until you get right up to the corner of that building. Then I started my car and was running in low. At the time I came almost to a stop I saw a watchman standing on the other side, close to the sidewalk, about one or two feet from the sidewalk. ..... When I observed this watchman, he was standing there facing the shanty (watchman's shanty), and there was another man standing on the sidewalk facing him, and they were talking together and he had his stop signal in his left hand, and it was hanging down, and that made me think that the train had just passed. ..... After I slowed down and started up again, the other fellow was saying something to the watchman--I know the watchman there--and then he started running toward me and waved with his paddle to stop, and I looked at him. I didn't know what he wanted because I know him, and then when he points and I looked, the train was almost on top of me.

"As you approach this track from the west there is a big plant on the left hand side, called the American Steel Foundry. After you get east of that you find a building 20 or 25 feet wide and about 100 feet long, of Reimer's Coal & Feed Company. The next building is the Terminal Freight House--about 20 or 25 feet wide and 90 to 100 feet long. Its length extends parallel with the tracks, and the track is about 20 feet east of the east side of the building."

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Appellee testified that on the day in question, as he approached said crossing, he was driving about 20 miles per hour, and that when he got about 30 or 40 feet from the track in question he came "almost to a complete stop." He further testified: "I looked to the south and to the north, but you can't see nothing until you get right up to the corner of that building. Then I started my car and was running in low. . . . the time I came almost to a stop I saw a watchman standing on the other side, close to the sidewalk, about one or two feet from the sidewalk. ..... When I observed this watchman, he was standing there facing the street (watchman's street), and there was another man standing on the sidewalk facing him, and they were talking together--and he had his stop signal in his left hand, and it was hanging down, and that made me think that the train had just passed. ..... After I slowed down and started up again, the other fellow was waving something to the watchman--I know the watchman there--and then he started running toward me and waved with his paddle to stop, and I looked at him. I didn't know what he wanted because I know him, and then when he points and I looked, the train was almost on top of me.

The front end of my car was right on the Big Four railroad track. I was in that position when the watchman started toward me. I was running slow. The best I could do was get off. I put the gas on trying to get off. The train struck the rear end of the car and side-swiped me. Prior to the time I was struck there was no whistle blown on this engine that struck me, and there was no bell ringing. There was no warning of any kind given of the approaching of this train."

Gus Tom, a witness on behalf of appellee, among other things testified: "I was coming from work that day, a little after twelve o'clock, and I come over the tracks and a fellow at the first shanty (the watchman), he came out to stop and I stopped at the next track, and when I saw that train coming I stopped right away, and the other watchman--I looked over there and he was talking to the other fellow, and that fellow just hit him and I hear the wreck. I never paid no attention how long the watchman near the middle shanty talked to the man--it all come at once. I saw the watchman at the middle shanty make like that (indicating) with his hand when the train was coming about five or ten feet. Duffner was right to the track at that time." This witness also testified that in his judgment the train in question was running from 25 to 30 miles per hour; that he heard the whistle on the train blow once before it reached the crossing; that he did not hear any bell ringing.

The witnesses on the part of appellant testified that the regular whistles were blown and that there was an automatic bell on the engine which was ringing all the time as said engine approached said intersection; that appellee was driving at a speed of from 25 to 40 miles per hour, but that as he neared said crossing he slowed down and then afterwards speeded up. The watchman and certain other witnesses on behalf of appellant testified that said watchman held up his stop signal as appellee

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approached said crossing, but that notwithstanding, appellee ran his automobile on the track and was struck by said train.

It was a question for the jury as to whether or not appellee was in the exercise of due care for his own safety just prior to and at the time of said collision. If the jury believed the testimony of appellee with reference to the actions of appellant's watchman, he was negligent in failing to warn appellee of the approach of said train in sufficient time for him to stop his car and avoid injury. The jury had the right to take into consideration, in determining whether or not appellee used due care in approaching said crossing, the conduct of appellant's watchman; in other words, if appellant maintained a regular watchman at said crossing, persons driving along said street and over said crossing had the right to rely on said watchman using reasonable diligence to warn them of the approach of trains. C. St. L. & P. R. R. Co. v. Hutchinson, 120 Ill. 587-593; C. R. I. & P. Ry. Co. v. Clough, 134 Ill. 586-592; C. & A. R. R. Co. v. Blaul, 175 Ill. 183-188; Deheave v. Hines, etc., 217 App. 427-431.

In Chicago, R. I. & P. Ry. Co. v. Clough, supra, the court at page 592 in discussing this question, says:

"A flagman was stationed at the crossing in question, and it was his duty to know and give timely warning of the near approach of trains, and appellee and the public had a right to rely upon a reasonable performance of that duty. The refusal of the court to give the instruction was fully justified by the decision of this court in Chicago, St. Louis & Pittsburg Ry. Co. v. Hutchinson, 120 Ill. 587, and other cases."

We are of the opinion and hold that the verdict of the jury is not against the manifest weight of the evidence.

It is also contended that the court erred in refusing to give appellant's fourth refused instruction. So far as said instruction states correct principles of law, it was cov-

approached said crossing, but that notwithstanding, appellee ran his automobile on the track and was struck by said train.

It was a question for the jury as to whether or not appellee was in the exercise of due care for his own safety just prior to and at the time of said collision. If the jury believed the testimony of appellee with reference to the actions of appellant's watchman, he was negligent in failing to warn appellee of the approach of said train in sufficient time for him to stop his car and avoid injury. The jury had the right to take into consideration, in determining whether or not appellee used due care in approaching said crossing, the conduct of appellant's watchman; in other words, if appellant maintained a regular watchman at said crossing, persons driving along said street and over said crossing had the right to rely on said watchman using reasonable diligence to warn them of the approach of trains. C. St. L. & P. R. R. Co. v. Hutchinson, 120 Ill. 587-592; C. R. I. & P. Ry. Co. v. Crouch, 154 Ill. 389-392; C. & A. R. R. Co. v. Blaul, 175 Ill. 124-129; Delaney v. Hines, etc., 217 App. 427-431.

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We are of the opinion and hold that the verdict of the jury is not against the manifest weight of the evidence.

It is also contended that the court erred in refusing to give appellant's fourth refused instruction. So far as said instruction states correct principles of law, it was cov-

ered by other instructions given on behalf of appellant. That being true, the court did not err in refusing this instruction.

No question is raised as to the rulings of the court on the evidence, nor as to the amount of the verdict.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported

5803a

Term No. 52 Agenda No. 24

In The

APPELLATE COURT OF ILLINOIS,

Fourth District.

OCTOBER TERM, A. D. 1926

ALBERT SENCIPER, Appellee, -vs- H. C. MASSEY and ROY W. MASSEY, Co-partners, doing business as MASSEY BROTHERS, Appellants.	Appeal from the City Court of Granite City, Illinois.

OPINION by BOGGS, J.

This is an action in assumpsit, instituted by appellee against appellants to recover for an alleged balance owing by appellants to appellee on a contract in and by which he was to drive a milk wagon for appellants, who were engaged in the dairy business in Granite City, Illinois. The declaration consisted of the common counts, to which appellants filed a plea of the general issue.

By agreement of parties, said cause was referred to one Wesley Lueders as referee, to take the testimony in said cause and report the same in writing, together with his conclusions of law and fact thereon. The evidence was taken by said referee, and was reported to the court, together with his conclusions. The referee found and reported to the court that

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OCTOBER TERM, A. D. 1924

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OPINION by BOGGS, J.

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there was due from appellee to appellants the sum of $89.53, for which judgment should be entered against appellee. Exceptions were filed to said report, and on hearing, said exceptions were sustained, and the court found that after allowing appellants all amounts justly owing to them from appellee, there was due appellee the sum of $345.77, and judgment, with costs, was rendered therefor. To reverse said judgment, this appeal is prosecuted.

The principal contention of appellants is that the finding and judgment of the court is against the manifest weight of the evidence, and that the court misconstrued the contract entered into between appellee and appellants.

The record discloses that on April 24th, 1922, appellants entered into a contract with appellee for his employment as a driver of one of their milk wagons. Said contract, among other things, provided:

"It is hereby agreed that for his (appellee's) services rendered in behalf of the company, as herein provided, the said driver is to receive the customary wages set for one-horse drivers by Teamsters' Local Union No. 61, which is at this time $35 per week, payable weekly. ..... The hours of service to be set by the company, and to be not more than 84 hours per week. It is further agreed that the first $30 earned by the driver shall be retained by the company until the termination of this contract, when it shall become due and payable to said driver."

Appellee began work under said contract, and worked for a short while, for which work he was paid by appellants. Thereafter, in July, 1922, he again entered appellants' employ and continued therein until March 13th, 1924. Appellants paid appellee $35 per week for his services rendered up to June 1st, 1923, and $38 per week thereafter. In March, 1924, a dispute having arisen between appellee and appellants as to the state

there was due from appellee to appellants the sum of $89.55, for which judgment should be entered against appellee. Exceptions were filed to said report, and on hearing, said exceptions were sustained, and the court found that after allowing appellants all amounts justly owing to them from appellee, there was due appellee the sum of $846.77, and judgment, with costs, was rendered therefor. To reverse said judgment, this appeal is prosecuted.

The principal contention of appellants is that the finding and judgment of the court is against the manifest weight of the evidence, and that the court misconstrued the contract entered into between appellee and appellants.

The record discloses that on April 24th, 1922, appellants entered into a contract with appellee for his employment as a driver of one of their milk wagons. Said contract, among other things, provided:

"It is hereby agreed that for his (appellee's) services rendered in behalf of the company, as herein provided, the said driver is to receive the customary wages set for one-horse drivers by Teamsters' Local Union No. 81, which is at this time $35 per week, payable weekly. ..... The hours of service to be set by the company, and to be not more than 84 hours per week. It is further agreed that the first $50 earned by the driver shall be retained by the company until the termination of this contract, when it shall become due and payable to said driver."

Appellee began work under said contract, and worked for a short while, for which work he was paid by appellants. Thereafter, in July, 1922, he again entered appellants' employ and continued therein until March 13th, 1924. Appellants paid appellee $35 per week for his services rendered up to June 1st, 1923, and $28 per week thereafter. In March, 1924, a dispute having arisen between appellee and appellants as to the state

of their account, appellee ceased working for appellants, and thereafter this suit was instituted by appellee.

One of the questions in dispute between said parties is as to whether appellee's right of recovery was limited to $35 per week until said scale was increased to $38 per week, and then to $38 per week for the remainder of the time he was in the employ of appellants, as claimed by appellants; or whether appellee, under the terms of said contract, was entitled to recover for overtime and for double pay for work on Sundays, in keeping with the provisions of the scale fixed by said Local Union No. 61.

Article 6 of the ~~articles of~~ agreement entered into between the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local No. 61, and appellants, who signed to be governed thereby, provides:

"All teamsters, chauffeurs and helpers shall be paid from the time they leave the barn until they come back. Nine hours per day, starting time 7 A. M. till 12 o'clock noon; 1 o'clock till 5 o'clock. One-half day on Saturdays, 7 A. M. till 12 noon. All time over nine hours per day and five hours on Saturday shall receive time and a half at the rate of 65 and 70 cents per hour, which rate the man is receiving."

Article 3 provides that "it shall not be compulsory for employees to work on holidays or Sundays. If so doing, shall receive double time, except when holidays immediately precedes or immediately follows a Sunday, in which events ice and milk wagon drivers shall work on Sunday at the regular scale of wages."

Appellee testified, and it is not disputed, that he worked every Sunday during the time he was in the employment of appellants. While he could not definitely state the number of hours he put in each week, he testified that there never was a week in which he did not put in at least 84 hours.

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Article 8 of the [redacted] agreement entered into between the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local No. 41, and appellants, who signed to be governed thereby, provides:

"All teamsters, chauffeurs and helpers shall be paid from the time they leave the barn until they come back. Nine hours per day, starting time 7 A. M. till 12 o'clock noon; 1 o'clock till 5 o'clock. One-half day on Saturdays, 7 A. M. till 12 noon. All time over nine hours per day and five hours on Saturday shall receive time and a half at the rate of 68 and 70 cents per hour, which rate the man is receiving."

Article 3 provides that "it shall not be compulsory for employees to work on holidays or Sundays. If so doing, shall receive double time, except when holidays immediately precedes or immediately follows a Sunday, in which events ice and milk wagon drivers shall work on Sunday at the regular scale of wages."

Appellee testified, and it is not disputed, that he worked every Sunday during the time he was in the employment of appellants. While he could not definitely state the number of hours he put in each week, he testified that there never was a week in which he did not put in at least 84 hours.

Appellants do not undertake to dispute by the facts in the case the time claimed to have been put in by appellee, but undertake to show that other drivers who had the route which appellee had, did the work in seven or eight hours per day. This evidence was objected to, but was heard by the referee subject to objection. Appellants further contended that appellee did not put in all of his time while out on the route, delivering milk, but that he was using some of the time for his personal business.

This latter contention we do not think is sustained by the evidence in the case. We are of the opinion and hold that, under the contract entered into between appellants and appellee, appellants were to pay according to the scale of wages fixed by said Local Union No. 61, and that the trial court was correct in so holding. Appellants practically concede that this would be true, but say that appellee, without objection, had from time to time settled with them at $35 or $38 per week, without any claim for pay for overtime or Sundays. The evidence in the record tends to show that appellee did not know, up until he ceased working for appellants, that he was entitled to pay for the work done by him on Sundays. We do not understand that appellee would be barred of his right to recover according to the terms of his contract, even though its provisions proved to be more beneficial to him than he had at first anticipated.

Counsel for appellants in his argument says: "It is true that the agreement or understanding with the union and the employer was that milk drivers were to receive some extra compensation for work performed on Sundays, except where a holiday immediately preceded or followed such Sunday. Appellants, having signed this agreement, knew of it. Appellee, a member of the Local 61, was bound to know of the conditions, and it is apparent from the evidence and from all the facts and circum-

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This latter contention we do not think is supported by the evidence in the case. We are of the opinion and hold that, under the contract entered into between appellants and appellee, appellants were to pay according to the scale of wages fixed by said Local Union No. 81, and that the trial court was correct in so holding. Appellants practically concede that this would be true, but say that appellee, without objection, had from time to time settled with them at $25 or $28 per week, without any claim for pay for overtime or Sundays. The evidence in the record tends to show that appellee did not know, up until he ceased working for appellants, that he was entitled to pay for the work done by him on Sundays. We do not understand that appellee would be barred of his right to recover according to the terms of his contract, even though the provisions proved to be more beneficial to him than he had at first anticipated.

Counsel for appellants in his argument says: "It is true that the agreement or understanding with the union and the employer was that milk drivers were to receive some extra compensation for work performed on Sundays, except where a holiday immediately preceded or followed such Sunday. Appellants, having signed this agreement, knew of it. Appellee, a member of the Local 81, was bound to know of the conditions, and it is apparent from the evidence and from all the facts and circum-

stances in this case that during the long time of employment neither party, at any time, contemplated paying or receiving any compensation for overtime. Notwithstanding the fact that appellee belonged to the union and was in a position to have demanded pay for extra or overtime for Sunday work, yet he never at any time made complaint or asked or expected any other pay except the weekly pay of $35 and $38 per week, respectively."

Counsel for appellants is in the position of practically admitting that the contract provides for payment for Sunday work, but because of the fact that appellee had not demanded such extra pay up to that time, ~~claim~~ that he is not entitled to recover therefor. We are of the opinion and hold that this position is not well taken.

Appellants insisted that appellee was indebted to them in the sum of $296.65, as shown by the books kept from statements rendered by appellee, which credit the court allowed appellants in full. The court then found that appellee worked on all Sundays from August 1st, 1922, to June 1st, 1923, making forty-three Sundays, which at double time amounted to $243.81; that from June 1st, 1923, to March 13th, 1924, he worked forty-one Sundays, which at double time came to $254.61, making a total for work on Sundays of $498.42, and that appellee had worked for appellants three weeks for which he had not been paid, at $38 per week, coming to $114.00, and that there was $30.00 retained from the first moneys earned by appellee, making a total, with the amounts owing for Sunday work, of $642.42, and that, crediting appellants with the $296.65, a balance remained owing to appellee of $345.77, for which judgment was rendered.

Appellants do not undertake to show from the evidence in the record that the finding of the court as to the amount of

stances in this case that during the long time of employment neither party, at any time, contemplated paying or receiving any compensation for overtime. Notwithstanding the fact that appellee belonged to the union and was in a position to have demanded pay for extra or overtime for Sunday work, yet he never at any time made complaint or asked or expected any other pay except the weekly pay of $35 and $36 per week, respectively."

Counsel for appellants is in the position of practically admitting that the contract provides for payment for Sunday work, but because of the fact that appellee had not demanded such extra pay up to that time, that he is not entitled to recover therefor. We are of the opinion and hold that this position is not well taken.

Appellants instituted that appellee was indebted to them in the sum of $209.85, as shown by the books kept from statements rendered by appellee, which credit the court allowed appellants in full. The court then found that appellee worked on all Sundays from August 1st, 1922, to June 1st, 1923, making forty-three Sundays, which at double time amounted to $243.81; that from June 1st, 1923, to March 15th, 1924, he worked forty-one Sundays, which at double time came to $234.61, making a total for work on Sundays of $468.42, and that appellee had worked for appellants three weeks for which he had not been paid, at $38 per week, coming to $114.00, and that there was $30.00 retained from the first moneys earned by appellee, making a total, with the amounts owing for Sunday work, of $642.42, and that, crediting appellants with the $209.85, a balance remained owing to appellee of $432.57, for which judgment was rendered.

Appellants do not undertake to show from the evidence in the record that the finding of the court as to the amount of

time put in by appellee on Sundays was incorrect. Neither do they undertake to show that the finding of the court is not correct, provided the same is based on the scale of wages fixed by said Local Union No. 61. That being true, we see no occasion for disturbing the finding of the court as to the amount due.

Counsel for appellee insists further that appellee is entitled to recover from appellants for having consummated the purchase for appellants of a milk route from a competitive company, and for which he insists appellants gave him to understand he would be paid. The trial court did not allow appellee anything on this claim, and as appellee did not assign cross errors on the record, he is not in a position to urge said claim here.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported

Term No. 6.

Appellate Court
Fourth District
October Term, A. D. 1926.

Agenda No. 2.

The People of the State of Illinois upon the Relation of T. W. Hall,
Appellant

vs.

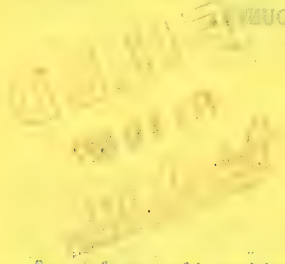
George Sweazey,
Appellee.

APPEAL FROM THE CIRCUIT COURT
of
WHITE COUNTY.

OPINION BY HIGBEE, J.

This is an action of quo warranto to question the right of appellee, George Sweazey to the office of alderman from the third ward of the city of Carmi. The information alleges that appellee in April, 1925 was duly elected an alderman from the third ward of Carmi and on the first Monday of May of that year assumed the duties of that office, and has since that time continued to act as such alderman; that before the first day of July, 1925 he moved from said ward and has since resided in the second ward of that city, and therefore, was not legally entitled to hold the office of alderman of the third ward. To the information appellee filed a plea of justification admitting his election as alderman and alleging that at the time of his election he resided in the third ward, and has continued to reside therein. The plea further alleges that prior to his election, he was and since then has been employed as a superintendent of a cold storage plant located in the third ward; that his duties as such superintendent required his presence about the plant in the third ward the greater part of each working day of the week, and sometimes on Sunday and during the night; that he resided in a dwelling near the plant which he leased and still continues to lease from his employer; that about July, 1925, he sublet a portion of this residence but retained a part for his own use; that his wife and daughter, in order that his daughter might be more conveniently located to attend school moved temporarily into the second ward, but that he continued to reside in the former dwelling in the third ward.

Upon a trial before a jury a verdict was returned finding appellee not guilty. Motion for a new trial was overruled and this appeal perfected. Three witnesses testified in behalf of appellant. ~~Three~~ These witnesses



estified in substance that they had frequently seen appellee going to nd from the dwelling in the second ward where his wife and daughter ived, some testifying that they had been entertained in that home of venings, and that appellee was there. One witness, a grocer, testified that he had delivered groceries purchased by appellant, to the dwelling in the second ward, and had seen appellee there when making such deliveries.

Appellee in his own behalf testified that while his wife and daughter had moved out of the third ward, he had retained his residence in that ward; that he retained a room for himself and kept some clothing and bedding there; that a portion of the time he spent his nights and prepared some of his own meals there. In this statement he was to some extent corroborated by the man and his wife to whom he had leased a portion of his dwelling. Other witnesses were permitted to testify in behalf of appellee to statements he had made to the effect that he was not removing out of the third ward, but was retaining his residence there. Objection was made to the introduction of ~~this~~ testimony relating to appellee's own statement on the ground that it was ~~they were~~ self-serving and inconsistent with appellee's acts.

Upon the question of residence the law of this state is, as laid down in the case of Welsh v. Shumway 232 Ill. 54, that the intention of a person is of great importance and it is there also said that usually the declarations of a voter are admissible for the purpose of showing his intention, though not necessarily conclusive. To the same effect is Wilkins v. Marshall 80 Ill. 74. In Wallace v. Lodge 5 Ill. App. 507 it was held in an attachment case, involving the residence of the defendant in the suit, that declarations made by the defendant as to his intentions at the time when he left this state concerning his return were competent, and in the course of the opinion the following language is used-

"Greenleaf, in his work on Evidence Vol. 1, Sec. 108, lays down the rule that the declarations of a party made at the time of a change of residence or domicile, or upon a journey, or where he leaves his home, or returns thither, or remains abroad, or secretes himself, or, in fine, does any other act material to be understood, such declarations, made at the time of the transaction, and expressive of its character, motive or object,

are regarded as verbal acts indicating a present purpose and intention, and are therefore admitted in proof, like any other material facts".

We conclude, in accordance with these authorities it was not error to admit the statements made by appellee, in relation to his residence.

Complaint is made of the trial court's action in giving and refusing instructions. It is urged that the court erred in refusing to give the relator's instructions 5 and 6.

Instruction 5 reads as follows: "The court instructs the jury that the place of residence as used in these instructions means the place where the defendant as head of a household maintains his establishment and conducts the ordinary business of keeping and maintaining a home", and instruction 6 reads "the court instructs the jury that the term 'residence' as used in the law requiring an alderman to reside in the ward from which he was elected means actually bodily residing and living in said ward, and not the mere intention of holding some place as his residence other than the place where he is bodily present and where he maintains his household". These both stated abstract propositions of law and might readily have been misleading when applied by the jury to the facts in this case. We are of the opinion that it was not error to refuse them.

Complaint is also made that the court erred in giving appellee's instructions 8, 9, 11, 12, 15, 16 and 17. Instructions 8, 9, 11, 16 and 17 are said to single out portions of the evidence to the exclusion of other evidence. These instructions stated to the jury that certain facts mentioned in each one if established by the evidence might be taken into consideration by the jury, in determining the residence of appellee. While ~~altogether commended~~ they are not to be commended the giving of these instructions in our opinion does not constitute reversible error in this case.

Instructions 12 and 15 advised the jury that if it believed from the evidence defendant resided in the third ward and his wife and child in the second ward, yet defendant would have the right to visit his family in the second ward without losing his residence in the third ward. These instructions correctly stated a rule of law applicable to the facts in this case and are not erroneous.

regarded as verbal acts indicating a present purpose and intention, are therefore admitted in proof, like any other material facts".

In conclusion, in accordance with these authorities it was not for to admit the statements made by appellee, in relation to his residence. Complaint is made of the trial court's action in giving and refusing instructions. It is urged that the court erred in refusing to give the relator's instructions 5 and 6.

Instruction 5 reads as follows: "The court instructs the jury that the place of residence as used in these instructions means the place where the defendant as head of a household maintains his establishment and transacts the ordinary business of keeping and maintaining a home". And instruction 6 reads "the court instructs the jury that the term 'residence' used in the law requiring an alderman to reside in the ward from which he is elected means actually bodily residing and living in said ward, and not the mere intention of holding some place as his residence other than the place where he is bodily present and where he maintains his household". These abstract propositions of law and might readily have been misleading when applied by the jury to the facts in this case. We are of the opinion that it was not error to refuse them.

Complaint is also made that the court erred in giving appellee's instructions 8, 9, 11, 12, 15, 16 and 17. Instructions 8, 9, 11, 16 and 17 are mainly single out portions of the evidence to the exclusion of other evidence. These instructions stated to the jury that certain facts proved in each one if established by the evidence might be taken into consideration by the jury, in determining the residence of appellee. Conceded

We ~~[illegible]~~ they are not to be the giving of these instructions in our opinion does not constitute reversible error in this case.

Instructions 15 and 16 advised the jury that if it believed from the evidence defendant resided in the third ward and his wife and child in the second ward, yet defendant would have the right to visit his family in the second ward without loosing his residence in the third ward. These instructions correctly stated a rule of law applicable to the facts in this case and are not erroneous.

Appellant refers to and depends largely on the case of People v. Ballhorn 100 Ill. App. 571 as sustaining the claim that the facts here should be held to show that appellee had changed his residence to another ward after his election.

In that case Ballhorn who had been elected Alderman for a certain ward in the City of Venice moved shortly afterwards into another ward temporarily and that his fixed intention was to return to the ward he was elected to represent. Upon the facts in that case this Court held that Ballhorn had changed his residence. It was there shown however that Ballhorn had not only moved his family from the ward he was elected to represent and rented his home to other parties but was also engaged in business in another ward.

Here appellee has continued in business in the ward from which he was elected, which requires his presence there ten or eleven hours a day, ~~but~~ and also retains a room in the house where he lived when elected, which he occupies part of the time and claims as his residence. Therefore the holding of the Court on the facts in the Ballhorn case can have no material bearing upon the conclusion to be reached upon the facts in this case.

This case presented to a large extent a question of fact for the jury. There was no reversible error in the instructions and the verdict should not be disturbed unless it was manifestly against the weight of the evidence which condition is not shown to ~~Excise~~ Excist by the record.

No sufficient reason appears for reversing this judgment and it is therefore affirmed.

AFFIRMED.

Not to be reported

Appellant refers to and depends largely on the case of People v. [illegible] 100 Ill. App. 571 as substantiating the claim that the facts here [illegible]ld be held to show that appellee had changed his residence to another [illegible] after his election.

In that case Smithson who had been elected Alderman for a certain [illegible] in the City of Venice moved shortly afterwards into another ward [illegible]rtly and that his fixed intention was to return to the ward he was [illegible]ted to represent. Upon the facts in that case this Court held that [illegible]erson had changed his residence. It was there shown however that [illegible] had not only moved his family from the ward he was elected to [illegible] and rented his home to other parties but was also engaged in [illegible]ess in another ward.

Here appellee has continued in business in the ward from which [illegible]ted, which requires his presence there ten or eleven hours a [illegible]. He also retains a room in the house where he lived when elected, which [illegible] comprises part of the time and claims as his residence. Therefore the [illegible]ing of the Court on the facts in the Smithson case can have no material [illegible] the conclusion to be reached upon the facts in this case.

This case presented to a large extent a question of fact for the [illegible]. There was no reversible error in the instructions and the verdict [illegible] not be disturbed unless it was manifestly against the weight of the [illegible] which condition is not shown to the record.

No sufficient reason appears for reversing this judgment and it [illegible] affirmed.

AFF'D.

Term No. 19. Agenda No. 20.

Appellate Court,

Fourth District,

October Term, A. D. 1926.

Edward Johnson, Appellee	Appeal from City Court
vs.	of
Joseph Feraud and August Feraud, doing business under the firm name and style of Feraud Brothers, Appellants.	Granite City.

OPINION BY HIGBEE, J.

Edward Johnson, appellee, brought suit in assumpsit against Joseph Feraud and August Feraud, partners, doing business under the name of Feraud Brothers, appellants, in assumpsit to recover commission for the alleged sale of real estate belonging to them. The declaration as filed consisted of the common counts and claimed $925.00 to be due appellee. Upon motion of appellants, appellee filed a bill of particulars averring an account stated between himself and appellants in the latter part of August, 1925 for $925.00. The case was heard by the court, without a jury and judgment rendered for appellee in the sum of $925.00. Appellee in his examination in chief was asked if he ever had any business transaction with appellants and upon answering in the affirmative was asked what the nature of that business was. To this question he answered "sale of a piece of real estate". He then testified that later he had a conversation with one of the appellants. ~~He did not detail that conversation with one of the appellants.~~ He did not detail that conversation but stated "we agreed that there was $1000 due me as commission on the sale". Appellants objected to this testimony and insisted that appellee should be required to tell what the conversation was and not simply state his conclusion that an agreement had been reached. The court ruled that the witness should go into further detail in the matter and the examination proceeded as follows:

"Q. Well, state what was said there as near as you can?

A. I said to him. You will have to the first of September, the third

Appeals No. 20.

Appellate Court,

Fourth District,

October Term, A. D. 1926.

Appellee,	
vs.	
Appellants and August Jerand,	
Appellees, under the	
Appellees,	
Appellants.	

Appeal from the Circuit Court

of

OPINION BY HIGBEE, J.

[illegible] and August Jerand, partners, doing business under the name [illegible] Brothers, appellants, in assumpsit to recover commission for [illegible] alleged sale of real estate belonging to them. The declaration [illegible] [illegible]ged at the common counts and claimed $[illegible].00 to be due [illegible]. Upon motion of appellants, appellee filed a bill of particulars [illegible] an account stated between himself and appellants in the [illegible] part of August, 1925 for $[illegible].00. The case was heard by the court, [illegible] a jury [illegible] [illegible] appellants [illegible] [illegible] of [illegible] business was. To this question he answered "[illegible] piece of real estate". He then testified that later he had a con-

[illegible] objected to this testimony and insisted that appellee should be [illegible] what the conversation was and not simply state to him conclu-[illegible] agreement had been reached. The court ruled that the witness [illegible] into further detail in the matter and the examination proceeded [illegible]

[illegible]

payment on this contract and that will....

Q. On what contract?

A. On this sale.

Q. Alright. Go ahead.

A. And taking ten per cent of the amount of the first payment, if we consider the sale was one hundred dollars in cash, two hundred dollars on the 15th of August and two hundred dollars on the first of September, and five hundred dollars in a note, that would be ten per cent of the amount due, if we consider that the first payment.

Q. Well, go ahead and tell the conversation there?

A. Well, that was the statement, that was the conversation between us, and that I thought I should be entitled to at least ten per cent of my commission.

Q. And did you talk about what the amount of the commission was, the entire amount?

A. I couldn't state whether it was stated in terms other than that as one hundred dollars being ten per cent of it".

He also testified that he afterwards requested payment of appellants, and that he was paid $25.00 on account, and that on two other occasions he was paid $25.00 on account. He was again asked if there had been any agreement as to the entire amount due him, and over objection of appellant was permitted to answer that there was an agreement and the amount was $1000.00. This is in substance all of appellee's testimony tending to shown an account stated. On Cross examination the court ruled that appellants could not cross-examine appellee as to the original transaction, that is the sale of real estate. This was on the gro nd that the action being upon the account stated the original transaction could not be inquired into. Upon the same ground appellants were practically denied the right to introduce any evidence as to the original transaction.

The three checks of $25.00 each given appellee by appellants were introduced in evidence. Appellants testified that these were simply loans to appellee and the checks were so marked. Appellee however testified that the word "loan" which appeared on the checks in

[illegible] contract was [illegible]?

A. On what [illegible]?

A. On this sale.

A. Alright. Go ahead.

A. And taking ten per cent of the amount of the first payment, if consider the sale was one hundred dollars in cash, two hundred dollars the 15th of August and two hundred dollars on the first of September, five hundred dollars in a note, that would be ten per cent of the amount due, if we consider that the first payment.

Q. Well, go ahead and tell the conversation there?

A. Well, that was the statement, that was the conversation between and that I thought I should be entitled to at least ten per cent or at least [illegible].

A. Did you talk about what the amount of the commission would [illegible]?

A. I couldn't state whether it was stated in terms other than that one hundred dollars being ten per cent of it.

He also testified that he afterwards received payment of [illegible], and that he was paid $35.00 on account, and that on two other occasions he was paid $45.00 on account. He was again asked if there was an agreement as to the entire amount due him, and over objection [illegible] was [illegible]. This is in substance all of evidence [illegible] tending to show an account stated. On cross examination the court [illegible] that appellants would not cross-examine appellee as to the original [illegible], that is the sale of real estate. This was on the 4th [illegible] the action being upon the account stated the original transaction [illegible] not be inquired into. Upon the same ruling appellants were [illegible].

The [illegible] $40.00 each [illegible] appellants testified that these were [illegible] to appellee and the checks were [illegible] appellee [illegible] testified that the word "loan" which appeared on the checks in

evidence was not there when they were given to him, nor when he cashed them. It is insisted by appellants that even though this is an action upon an account stated they should have been permitted to cross examine appellee concerning the original transaction, and should also have been permitted to testify in their own behalf as to the same, and to deny that they had ever employed appellee to sell the real estate in question, or that he had anything to do with the selling of it.

It does appear in the evidence that appellee did not know the party to whom the real estate in question was sold, and had never even seen him. In our opinion it is unnecessary for us to pass upon the question as to whether, as this was an action upon an account stated, it was or was not proper for appellants to introduce evidence as to the original transaction upon which the account stated was based, for the reason that when appellee was asked the question if he had had any business transaction with appellants and replied that he had, and that it was concerning the sale of the real estate, the question of the original transaction was opened up and appellants had the right to cross examine him upon that question, and also to introduce evidence in their own behalf in connection therewith. It was therefore error to deny appellants the right to cross examine appellee and to testify themselves concerning appellee's employment and to deny if such was the fact that he sold the real estate in question.

Again it appears to us that the conversation testified to by appellee does not amount to an account stated under the rule laid down in 1 Corpus Juris page 364. It was improper to permit him to testify that an agreement had been reached. He should only have been permitted to detail the conversation, leaving to the court the question whether that conversation amounted to an agreement of the amount due on an account stated. While the evidence that the checks were simply loans to appellee is not entirely satisfactory, yet in view of the errors above referred to, we are of the opinion the judgment should be reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported

[illegible] was not there when they were given to him, nor when he ceased [illegible]. It is insisted by appellants that even though this is an action [illegible] an account stated they should have been permitted to cross examine [illegible] appellee concerning the original transaction, and should also have been [illegible]mitted to testify in their own behalf as to the complaints to deny [illegible] they had ever employed appellee to sell the real estate in question, [illegible] that he had anything to do with the selling of it.

It does appear in the evidence that appellee did not know the [illegible]ty to whom the real estate in question was sold, and had never even [illegible] him. In our opinion it is unnecessary for us to pass upon the [illegible]estion as to whether, as this was an action upon an account stated, it [illegible] or was not proper for appellants to introduce evidence as to the [illegible] concerning the sale of the real estate. [illegible] it was [illegible] transaction was opened up and appellants had the right to cross examine [illegible] upon that question, and also to introduce evidence in their own behalf [illegible] connection therewith. It was therefore error to deny appellants the [illegible] to cross examine appellee and to testify themselves concerning [illegible] appellee's employment and [illegible] [illegible] and [illegible] to sell [illegible].

It appears to be that the conversation testified to by [illegible] does not amount to an account stated under the rule laid down [illegible] I Illinois Juris page 584. It was improper to permit him to testify [illegible] agreement had been reached. He should only have been permitted [illegible] to repeat the conversation, leaving to the court the question whether [illegible] amounted to an agreement as to the amount due on an account [illegible]. While the evidence that the checks were simply loans to appellee [illegible] is entirely satisfactory, yet in view of the errors above referred to [illegible] are of the opinion the judgment should be reversed and the cause [illegible].

REVERSED AND REMANDED.

Term No. 23. Agenda No. 41.

Appellate Court,
October Term, 1926.
Fourth District.

Irene Durbin, Appellee, vs. Chicago and Eastern Illinois Railway Company, a Corporation, Appellant.	Appeal from Circuit Court of Effingham.

STATEMENT OF THE CASE.

This is an action of trespass on the case brought by Irene Durbin, appellee, against the Chicago & Eastern Illinois Railway Company, appellant, to recover for personal injuries sustained as the result of a collision between the train of appellant and an automobile driven by appellee. On trial before a jury a verdict for $4500.00 was returned in favor of appellee. After motion for new trial was overruled judgment was entered upon that verdict, to review which this appeal has been perfected. The declaration upon which the case was tried consisted of one original and two additional counts. The second additional count charged both willful and wanton negligence on the part of appellee. At the close of appellee's evidence the court on motion of appellant instructed the jury to find appellant not guilty as to the second additional count. The first count of the declaration charged generally that appellant so carelessly and negligently operated its locomotive engine toward, to and across the highway crossing therein mentioned that it collided with the said automobile and caused the alleged injuries to appellee. The second count charged failure on the part of appellant to ring the bell or blow the whistle on said locomotive engine as required by the Statute. The evidence shows that the accident in question occurred at a highway crossing near appellant's station in the village of Mocassin. The mainstreet or highway in Mocassin known as Effingham street runs east and west and appellant's track crosses it in a north and south direction. Appellant's station

Appellate Court.
October Term, 1926.
Fourth District.

Irene Durbin, Appellee,	
vs.	
Illinois and Eastern Illinois Railway Company, a Corporation, Appellant.	

Appeal from

Circuit Court

of

Stringham.

STATEMENT OF THE CASE.

This is an action of trespass on the case brought by Irene Durbin, appellee, against the Chicago & Eastern Illinois Railway Company, appellant, to recover for personal injuries sustained as the result of a collision between the train of appellant and an automobile driven by appellee. At trial before a jury a verdict for $4500.00 was returned in favor of appellee. After motion for new trial was overruled judgment was entered on that verdict, to review which this appeal has been perfected. The declaration upon which the case was tried consisted of one original and four additional counts. The second additional count charged both willful and wanton negligence on the part of appellee. At the close of appellee's evidence the court on motion of appellant instructed the jury to find appellant not guilty as to the second additional count. The first count of the declaration charged generally that appellant so carelessly and negligently operated its locomotive engine tower, to and across the highway crossing therein mentioned that it collided with the said automobile and caused the alleged injuries to appellee. The second count charged failure on the part of appellant to ring the bell or blow the whistle on said locomotive engine as required by the statute. The evidence shows that the accident in question occurred at a highway crossing near appellant's station in the village of Moosearth. The maintenance of highway crossings at railroad grade is a matter of joint duty of both appellant and appellee, it is a joint duty to keep it in a safe and proper condition.

is about 200 feet north of the crossing and west of the railroad track, which does not curve until it reaches about three-fourths of a mile south of the crossing. Just north of the highway crossing a switch track leaves the main track, on the east side thereof and runs to the north for probably more than a quarter of a mile. Appellee testified that on the morning of April 26, 1924 she left the home of her friend Bessie Kyle in a Ford roadster belonging to Mrs. Kyle's brother, a 1923 model with the brakes in good order. Mrs. Kyle drove the automobile until the store of William H. Homan was reached where they stopped to get some gasoline. This store was on the south side of Effingham street some 200 feet west of appellant's track, and was located upon the south edge of the highway. About 24 feet w east of the store was a shed about 10 feet high and 15 or 20 feet wide east and west. East of this shed was the Homan's dwelling which was located about 20 feet south of the highway and about 100 feet west of appellant's track. East of the dwelling about 40 feet west of the track and 15 or 20 feet south of the road was a tree 20 to 25 feet tall. About 10 feet east of the dwelling was a small garage that stood back of the house. East of the dwelling and west of appellant's tracks were also some driven posts and small shrubbery. After getting the gasoline appellee herself drove the car. Appellee further testified that after they left the oil station she thought she heard a train whistle to the north; that she looked to the south and saw no train and she then looked to the north and saw a train coming from the north; that at that time she was 45 or 50 feet west of the railroad track and was travelling about 8 or 10 miles an hour; that when she was 4 or 5 feet west of appellant's track she saw the train coming from the south; that she put on the emergency brake and also the foot brake, but was unable to stop before reaching the track, and the train struck the automobile; that when she recovered consciousness she was on the ground, and was later removed to a hospital at Effingham; that her limb was broken, and after an ex-ray was taken an operation was performed upon her, and she remained in the hospital three months, after which she was taken to her home, and has not been able to use her limb since; that

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[illegible] feet high and 15 or 20 feet wide east and west. Next
this shed was the Bowman dwelling which was located about 20 feet
uth of the highway and about 100 feet west of appellant's track. Next
the dwelling about 40 feet west of the track and 15 or 20 feet south of
e road was a tree 20 to 25 feet tall. About 10 feet east of the
elling was a small garage that stood back of the house. East of the
elling and west of appellant's tracks were also some driven posts and
all shrubbery. After getting the gasoline appellee herself drove the
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e ground, and was later removed to a hospital at Whitingham; that her
nk was broken, and after an x-ray was taken an operation was performed
on her, and she remained in the hospital three months after which she
s taken to her home, and has not been able to use her limb since; that

she did not remember making a written statement to appellant's claim agent on April 30, 1924, which was introduced in evidence as defendant's exhibit 2, but stated that the signature thereon appeared to be in her handwriting; that she did not hear any bell or whistle sounded on the train from the south. Mrs. Kyle testified that after they left the filling station and as they passed the Homan dwelling she looked to the south and did not see any train; that she then looked to the north and saw the train coming from that direction and continued to watch; that within about 5 or 6 feet of appellant's track she saw the train from the south and jumped from the automobile; that the train from the north was on the west track in front of the depot and about 200 feet north of the crossing when she saw it; that she did not hear any bell or whistle on the train from the south, and never heard the train from the north whistle. This witness was also shown the signed statement identified as defendant's exhibit 2. She admitted the signature, but denied the last portion of the statement.

Jesse Doty, a witness in behalf of appellee testified that at the time of the accident he and Walter Syfert were unloading gravel from a car standing on appellant's switch track about 200 feet north of the crossing and that when he first saw the automobile it was about 100 feet west of appellant's track, and was running about 8 or 10 miles an hour; that he saw the train coming from the south, but did not see the train from the north until after he got down to the place of the accident that it was only just a few minutes after the accident until he noticed the train; that he never heard any bell or whistle warning on the train coming from the south; that the train from the north was about a quarter of a mile away when he first noticed it. The witness Walter L. Syfert testified he saw the automobile leave the oil station and noticed it before he did the train coming from the south which was something like a quarter of a mile from the crossing when he first saw it; that the automobile was traveling from 5 to 15 miles an hour at the time it left the filling station; that no warning of any kind was given by the train from the south; that he saw the train to the north, and that it was pulling in on the switch when the other train was coming from the south, and that the train to the north was then about a

did not remember making a written statement to appellant's claim
on April 30, 1924, which was introduced in evidence as defendant's
Exhibit 2, but stated that the signature thereon appeared to be in her
writing; that she did not hear any bell or whistle sounded on the
train from the south. Mrs. Hyle testified that after they left the
filling station and as they passed the Homan dwelling she looked to the
north and did not see any train; that she then looked to the north and
saw a train coming from that direction and continued to watch; that
when about 5 or 6 feet from appellant's track she saw the train from the
north and jumped from the automobile; that the train from the north was
the first track in front of the depot and about 200 feet north of the
crossing when she saw it; that she did not hear any bell or whistle on
the train from the south, and never heard the train from the north
whistle. This witness was also shown the signed statement identified as
defendant's exhibit 2. She admitted the signature, but denied the last
portion of the statement.

James Doty, a witness in behalf of appellee testified that at the
time of the accident he and Walter Wyatt were unloading gravel from a
car standing on appellant's switch track about 200 feet north of the crossing
and that they had finished [illegible] feet south
of appellant's track, and was running about 8 or 10 miles an hour; that he
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north until after he got down to the place of the accident that it was only
a few minutes after the accident until he noticed the train; that he
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miles an hour at the time it left the filling station; that no warning of
the train was given by the train from the south; that he [illegible] the
train, and that it was pulling in on the switch when the other train was
coming from the south, and that the train to the north was then about a

half a mile away. This witness was asked about a cut in appellant's right of way south of the highway crossing, and testified over appellant's objection that this cut was about three-fourths of a mile south of the crossing and was about 12 or 15 feet deep. Dr. F. Buckmaster testified in behalf of appellee, that he attended her while in the hospital, and on the morning of the 28th of April 1924, operated on her fractured limb; that on April 29th, the day following the operation she was quite sick and excited and at times was in a condition of semi-stupor; that the customary, reasonable and ordinary charges for services such as he rendered appellee would be $500. or $600.00; Omer Hill the chief operator of appellant at Mocassin testified that it was a part of his duties to make a record of the time that the train from the south which collided with appellee's car, and the one from the north, arrived, and that said record showed that the train from the north arrived some considerable minutes later than the one from the south. He stated however that he had no independent recollection of this matter, and, upon objection of the appellee, the court refused to admit this record in evidence.
W. S. Heath, conductor of the train in question testified that as they approached the crossing that morning he was riding in the caboose with brakemen Rolls and Peet; that as the train approached the whistling post the engineer gave one long whistle, and as they neared the crossing two long and two short whistles; that he looked out and observed the signal at the board at the station which indicated that orders were there waiting for him; that when the train stopped and he went back to the place of the accident: that he did not see the accident, but that as they were carrying appellee into the depot she told him her brakes didn't work. The brakeman Peet testified that ~~as they approached the crossing~~ he was in the caboose of the train and that the whistle was sounded for the whistling post and also for the station as they approached the crossing; that he was on the left-hand side of the caboose at that time; that they were taking appellee from beneath the car when he first saw her, and that as they approached the crossing there was no train coming from the north; that he looked to the north and could see for one-half mile in that direction;

mile away. This witness was asked about a cut, in appellant's right way south of the highway crossing, and testified over appellant's objection that this cut was about three-fourths of a mile south of the crossing and was about 12, or 15 feet deep. Dr. [illegible] Hammacher testified in behalf of appellee, that he attended her while in the hospital, and on the morning of the 28th of April 1924, operated on her fractured limb; that on April 29th, the day following the operation she was quite sick and excited and at times was in a condition of semi-stupor; that the attendance, reasonable and ordinary charges for services such as he rendered appellee would be $800, or $600.00; Omer Hill the relief operator for appellant at Mazeppa testified that it was a part of his duties to make a record of the time that the train from the south which collided with appellee's car, and the one from the north, arrived, and that said record showed that the train from the north arrived some considerable minutes later than the one from the south. He stated however that he had no independent recollection of this matter, and, upon objection of appellee, the court refused to admit this record in evidence.

S. Heath, conductor of the train in question testified that as they approached the crossing that morning he was riding in the caboose with Clemen Rolla and Peet; that as the train approached the whistling post the engineer gave one long whistle, and as they neared the crossing two long and two short whistles; that he looked out and observed the signal on the board at the station which indicated that orders were there waiting for him; that when the train stopped and he went back to the place of the accident that he did not see the accident, but that as they were carrying appellee into the depot she told him her brakes didn't work. The brakeman testified that ~~the, approached the cars~~ he was in the caboose and the train; that the whistle was sounded for the whistling post and also at the station as they approached the crossing; that he was on the left-hand side of the caboose at that time; that they were taking appellee from beneath the car when he first saw her, and that as they approached the crossing there was no train coming from the north; that he looked to the south and could see for one-half mile; [illegible]

That he helped carry appellee to the depot and heard her say her brakes would not work; that as he went back to the station he looked to the north and saw a train headed in on the switch track about a quarter of a mile north of the depot, Brakeman Rolls testified that he heard the warning of the whistle at the whistling posts and at the crossing; that the first time he saw the train from the north was when they were returning from the carrying of appellee to the minister's home; that when the train stopped the caboose was three or four car lengths south of the crossing, and that as he got out of the caboose to go up to the station he saw appellee and the automobile at the side of the track, Albert Day, a section foreman for appellant testified that at the time of the accident he was about 300 feet east of the crossing in question; that he had just come from the depot down appellant's track to the crossing and then turned east to his home; that as he left the crossing he saw the train about three-fourths of a mile to the south; that prior to the time he saw it, he heard the whistle for the whistling post and the two long and two short blasts; that after he reached his home he could not see the train any more until it got within about eighty or one hundred feet of the crossing, and at that time he saw the automobile approaching from the west; That he ran back to the accident and helped carry appellee to the depot; that he went to call a doctor and when he returned the train to the north was then coming in on the switch; Elizabeth Haase testified in behalf of appellant that at the time of the accident she was living in the Homan house to the west of appellant's track and just south of Effingham street; that ~~on that day~~ at about 11:30 on the day of the accident she heard a train whistle just as she was ready to start from the house to the street; that she saw the train before she left the house and it was then four or five hundred feet south of the crossing; that she could not recall how many blasts of the whistle she heard; that she did not see the automobile, but heard the crash; that she did not look to the north. On cross examination this witness testified that, on further consideration she did not remember where she was when she heard the whistle. W. H. Homan the owner of the store and dwelling west of appellant's track testified that after appellee and her friend had started the automobile

That he helped carry appellee to the depot and heard her say her
[illegible] would not work; that as he went back to the station he looked to
[illegible] north and saw a train headed in on the switch track about a quarter
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[illegible] the first time he saw the train from the north was when they were
[illegible] from the carrying of appellee to the minister's house; that when
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[illegible] crossing, and that as he got out of the caboose to go up to the station
[illegible] saw appellee and the automobile at the side of the track. Albert Day,
[illegible] witness for appellant testified that at the time of the
[illegible] accident he was about 300 feet east of the crossing in question; that he
[illegible] had come from the depot down appellant's house to the crossing and
[illegible] turned east to his home; that as he left the crossing he saw the
[illegible] about three-fourths of a mile to the south; that prior to the time
[illegible] saw it, he heard the whistle for the whistling post and the two long
[illegible] and short blasts; that after he reached his home he could not see the
[illegible] anything more until it got within about eighty or one hundred feet of
[illegible] crossing, and at that time he saw the automobile approaching from the
[illegible]; that he ran back [illegible] the accident and helped carry appellee to the
[illegible]; that he went to call a doctor and when he returned the train to
[illegible] was coming in on the main line; Elizabeth Hass testified
[illegible] behalf of appellant that at the time of the accident she was living
[illegible] the house home to the west of appellant's track and just south of
[illegible] highway crossing; that ========== at about 11:30 on the day of the
[illegible] accident she heard a train whistle just as she was ready to start from
[illegible] house to the church; that she saw the train before she left the house
[illegible] it was about four or five hundred feet south of the crossing; that she
[illegible] not recall how many blasts the whistle she heard; that she did not
[illegible] the automobile, but heard the crash; that she did not look to the
[illegible] train. On cross-examination this witness testified that, further con-
[illegible] versation she did not remember where she was when she heard the whistle.
[illegible] of the state and dwelling west of appellant's track
[illegible] testified that after appellee and her friend had started the automobile

he heard a train whistle and his recollection was that it was one long blast and two short ones; that he then stepped to the east side of the porch and saw the train to the south possibly 800 or 1000 feet from the crossing; that he could not distinguish whether the whistle he heard was from a train to the north or south; that in a statement he formerly made he had said that the whistle he heard he took to be a whistle of the train to the north of the highway.

A witness for appellant testified that a Ford automobile such as the one driven by appellee with brakes in good working order and having two passengers could be stopped in about 7 or 8 feet while travelling at ten miles ~~pe~~ an hour. Appellant introduced in evidence a signed statement concerning the accident which its claim agent W. F. Tweedele stated he secured from appellee at the hospital on April 30, 1924, and which she read over at the time and stated ~~it~~ was correct. This written statement, referred to as defendant's exhibit 2, is to the effect that appellee did not look to see if the train was approaching as she was interested in getting the auto started and if she had looked toward the south she surely would have seen the train approaching as a person had a good view to the south with no obstructions between the track and the Homan dwelling. The claim agent ~~This witness also~~ testified that at the time this statement was taken appellee told him that she did not look to the south after she left the filling station, and that, if she had, she probably would have seen the train; that when about ten feet from appellant's track she glanced toward the south and for the first time saw the train coming from that direction. Appellant also offered in evidence a written statement purporting to be signed by the ~~witn~~ witness Bessie Kyle, which said claim agent ~~he~~ testified he secured at the same time as the one from appellee. This statement, however, the court upon objection of appellee, refused to admit.

The statement purports to have been taken on Wednesday, or April 30th, two days after the operation. Mrs. Kyle, also testified, that she walked along beside appellee as close as any other person as she was being carried from the depot to the minister's ~~home~~ house, and that appellee did not there state that the brakes didn't work or words to that effect. This witness further testified that she was in the room with appellee when the

heard a train whistle and his recollection was that it was one long
t and two short ones; that he then stepped to the east side of the
d and saw the train to the south possibly 800 or 1000 feet from the
; that he could not distinguish whether the whistle he heard was
a train to the north or south; that in a statement he formerly made
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ld have seen the train approaching as a person had a good view to the
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claim agent

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mess further testified that she was in the room with appellee when the

statement in question was signed, and that during this time appellee was in an apparent state of stupor part of the time, and that at times she would rouse up to some extent and then seem to fall back in a sleep or stupor; that appellee did not there state to the claim agent that at the time of the accident she was interested in getting the car started and did not look to the south nor if she had looked toward the south she would have seen the approaching train; that appellee did not read the paper nor was it read over to her. Appellee testified that she did not remember seeing the claim agent nor did she remember of him visiting her at the hospital or of ever seeing or signing the statement purported to have been signed by her, and she also denied making the statement to the c conductor that her brakes failed to work.

At the close of the testimony appellant moved the court to give to the jury an instruction directing a verdict in behalf of the appellant, which motion was overruled.

OPINION BY HIGBEE, J.

It is claimed by appellant that the action of the court in denying its motion for a directed verdict was erroneous for the reason that the evidence shows appellee was guilty of contributory negligence and was not using due care for her own safety at the time she was injured. To sustain this position appellant argues that the evidence clearly shows that had appellee looked to the south after passing the Homan residence she could have seen the train approaching from the south, since the evidence shows that for practically all the distance from this dwelling to appellant's railroad track the view to the south is unobstructed and the train would have been seen for a distance of at least half a mile.

No doubt it is true as a general rule of law that if by the exercise of ordinary care on the part of appellee she could have seen appellant's train approaching from the south, then the law made it her duty to see the train, and if she failed in that respect such failure would bar a recovery by her in this case. While true as a general proposition of law, the above doctrine is not applicable to every case involving personal injuries from an accident such as in this case. The question of whether or not appellee was in the exercise of due care and caution for her

[illegible] in question was signed, and that during this time appellee [illegible] in apparent state of stupor part of the time, and that at times [illegible] would rouse up to some extent and then seem to fall back in a sleep [illegible] stupor; that appellee did not there state to the claim agent that at [illegible] time of the accident she was interested in getting the car started [illegible] did not look to the south nor if she had looked towards the south [illegible] would have seen the approaching train; that appellee did not read the [illegible] nor was it read over to her. Appellee testified that she did not [illegible] remember seeing the claim agent nor did she remember of him visiting her [illegible] the hospital or of ever seeing or signing the statement purported to [illegible] have been signed by her, and she also denied making the statement to the c[illegible] [illegible] that her brakes failed to work.

At the close of the testimony appellant moved the court to give to [illegible] jury an instruction directing a verdict in behalf of the appellant.

[illegible] Ruling on the 3d.

It is claimed by appellant that the action of the court in denying [illegible] motion for a directed verdict was erroneous for the reason that the [illegible] evidence shows appellee was guilty of contributory negligence and was not [illegible] the care for her own safety at the time she was injured. To sustain this position [illegible] appellant argues that the evidence clearly shows that had appellee looked [illegible] the south after passing the house residence she could have seen the [illegible] train approaching from the south, since the evidence shows that for [illegible] practically all the distance from this dwelling to appellant's railroad [illegible] track the view to the south is unobstructed and the train would have been [illegible] for a distance of at least half a mile.

No doubt it is true as a general rule of law that it by the exercise [illegible] ordinary care on the part of appellee she could have seen appellant's [illegible] approaching from the south, then the law made it her duty to see [illegible] train and if she failed in that respect such failure would bar a [illegible] by her in this case. While true as a general proposition of [illegible] law, the doctrine is not applicable to every case involving personal [illegible] injuries from an accident such as in this case. The question of whether [illegible] appellee was in the exercise of due care and caution for her

own safety or was guilty of contributory negligence was a fact to be determined by the jury. Failure to look at a railroad crossing to see if a train is approaching is not negligence per se. It is negligence in fact if there are no conditions or circumstances which excuse such looking, and depends upon the facts, conditions and circumstances in proof surrounding the accident. (Boule v. I. C. R. R. Co. 88 Ill. App. 255, Chicago Junction Ry. Co. vs. Anrow 114 id. 501.) The evidence in behalf of appellee tends to show that she saw the train approaching from the north before reaching the crossing, and that her attention was upon that train. If this were true, it is our opinion that even though the view to the south was unobstructed and appellee could have seen the train coming from that direction if she had looked, she would not be chargeable with contributory negligence as a matter of law in not so doing, since she was equally chargeable with notice of a train approaching from the north. The jury was to determine the question of her contributory negligence or failure to exercise due care and caution in view of all the surroundings at the time and if they believed the testimony in her behalf that her attention was attracted to the train at the north, then under all the conditions surrounding the occurrence as shown by the proof, the jury would be justified in finding that appellee was not guilty of contributory negligence. (Gibbons v. A. E. & C. RR. Co. 263 Ill. 266, C & A. Railroad Co. vs. Pierson 184 id. 386 At any rate there being evidence in the record tending to support appellee's contention in this case it was incumbent upon the trial court to submit the case to the jury and deny appellant's motion for a directed verdict. The evidence as to whether this train was approaching from the north as testified to by appellee and some of her witnesses, is somewhat contradictory, yet there is some little evidence on the part of the witnesses in behalf of appellant tending to sustain her contention in that behalf. We cannot say that the jury who heard the witnesses testify and saw their demeanor upon the witness stand was not justified in accepting the version of her witnesses rather than those ~~xxxxxxx~~ of appellant. While the charge is made that she could easily have seen the train from the south if she had looked, yet none of the trainmen placed upon the witness stand by appellant, some of whom had equally as clear a view north to the highway as appellee

safety or was guilty of contributory negligence was not to be determined by the jury. Failure to look at a railroad crossing to see a train is approaching is not negligence ~~per se~~. It is negligence if, if there are no conditions or circumstances which excuse such failure, and depends upon the facts, conditions and circumstances in proof surrounding the accident. (Rule v. I. C. R. R. Co. 88 Ill. App. 585, Chicago Junction Ry. Co. vs. Arrow 114 id. 201.) The evidence in behalf of appellee tends to show that she saw the train approaching from the north before reaching the crossing, and that her attention was upon that train. If this were true, it is our opinion that even though the view to the south was obstructed and appellee could have seen the train coming from that direction if she had looked, she would not be chargeable with contributory negligence in not so doing, since she was [illegible] approaching with notice of a train approaching from the north. The jury [illegible] determine the question of her contributory negligence or failure to exercise due care and caution in view of all the surroundings at the time if they believed the testimony in her behalf that her attention was directed to the train at the north, then under all the conditions surrounding the occurrence as shown by the proof, the jury would be justified in [illegible] that appellee was not guilty of contributory negligence. (Hobbs v. C. & O. RR. Co. 265 Ill. 565, C & A. Railroad Co. vs. Pierson 184 id. 589.) Anyway there being evidence in the record tending to support appellee's contention in this case it was incumbent upon the trial court to submit the case to the jury and deny appellant's motion for a direct verdict. The evidence as to whether this train was approaching from the north as testified to by appellee and some of her witnesses, is somewhat contradictory. There is some little evidence on the part of the witnesses in behalf of appellant tending to sustain her contention in ~~her~~ behalf. We cannot say that the jury who heard the witnesses testify and saw their demeanor upon the witness stand was not justified in accepting the version of her witnesses rather than those ~~xxxxxxxx~~ of appellant. While the charge is such that she could easily have seen the train from the south if she had looked, yet none of the testimony placed upon the witness stand by appellant or of whom had equally as clear a view north to the highway as appellee

had from the highway to the south ~~of appellee, did not see~~ saw her car until it was struck by the train. It is quite likely that if a train was approaching from the north the attention of the trainmen on the train from the south would be diverted to the train coming from the north instead of an automobile approaching the crossing on the highway. This would also tend to explain why none of the trainmen saw appellee's car until after the collision. It is also insisted by appellant that the evidence does not support the verdict, in that it shows no negligence on the part of appellant's servants in operating the train in question. There was evidence on behalf of appellee showing that the bell was not sounded nor the whistle blown, as the highway was approached. On the other hand there was testimony on behalf of appellant to the effect that such signals were given. While the evidence on this question is contradictory it was a matter within the peculiar province of the jury to decide and their verdict, in that regard should not be disturbed.

Numerous of the court's rulings upon the admissiability of evidence are also urged as error. So many isolated bits of evidence are pointed out in this branch of appellant's argument that to discuss each of them would extend this argument to an unwarranted length. We deem it sufficient to state that we have examined each one of thesem matters of evidence referred to by appellant and are of the opinion that the court committed no reversible error in its rulings thereon. It is also insisted by appellant that the sixth instruction given in behalf of appellee was erroneous for the reason that it advised the jury, in case the jury found the issues for appellee, and that appellee had sustained damages by physical injuries, etc., it would not be necessary for any witnesses to express an opinion as to the amount of such damages, but the jury themselves might estimate the same "from the facts and circumstances in evidence, if any," and did not confine the jury to the facts and circumstances in evidence on the question of damages or on the question of such injuries, pain and suffering. In other words it is contended that this instruction permitted the jury in determining the damages to consider evidence which had no bearing whatever on the question of damages. We do not believe this instruction is subject to the criticism

[illegible] from the highway to the south [illegible] her car until [illegible] were struck by the train. It is quite likely that if a train was approaching from the north the attention of the trainmen on the train [illegible] the south would be diverted to the train coming from the north [illegible] or an automobile approaching the crossing on the highway. This [illegible] also tend to explain why none of the trainmen saw appellee's car until after the collision. It is also insisted by appellant that the [illegible] does not support the verdict, in that it shows no negligence [illegible] the part of appellant's servants in operating the train in question. [illegible] were witnesses on behalf of appellee showing that the bell was not [illegible] and the whistle blown, as the highway was approached. On the other hand there was testimony on behalf of appellant to the effect that [illegible] signals were given. While the evidence on this question is con- [illegible] it was a [illegible] the [illegible] and their testimony [illegible] in [illegible].

[illegible] of the court's action [illegible] in [illegible] [illegible] many isolated bits of evidence are pointed [illegible] in this record [illegible] [illegible] strict application to an unwarranted length. We deem it [illegible] sufficient to state [illegible] evidence referred to by appellant and are of the opinion that the court [illegible] no reversible error in its rulings thereon. It is also [illegible] by appellant that the sixth instruction given in behalf of [illegible] was erroneous [illegible] [illegible] jury to find the [illegible] by physical injuries, etc., it would not be necessary for any [illegible] to express an opinion as to the amount of such damages, but [illegible] jury themselves might estimate the same "upon the facts and circum- [illegible] in evidence, if any," and did not confine the jury to the facts [illegible] strangers in evidence on the question of damages or on the [illegible] such injuries, pain and suffering. In other words it is [illegible] that this instruction permitted the jury in determining the [illegible] to consider evidence which had no bearing whatever on the question [illegible] damage. We do not believe this instruction is subject to the criticism

made. An instruction in almost the identical language as the one here complained of was approved by the Supreme Court in the case of North Chicago Street Railway Co. vs. Fitzgibbons 180 Ill. 466, and Orr v. Wahfield Mfg. Co. 179 Ill. App. 235. However, in addition to this instruction a further instruction was given in behalf of appellee which advised the jury that "in determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to take into consideration all the facts and circumstances bearing upon that question, only which are proven by the evidence" so that upon the instructions as a whole, the jury could not have been misled upon this question.

It is further contended that the seventh instruction was also erroneous for the reason that the jury was advised that among the elements of damage to be considered by them would be hospital and doctor's bills shown by the evidence. It is contended this was erroneous because there was no proof that appellee had become liable for any payment of hospital or doctor's bills. There was proof as to what the reasonable hospital and doctor's bills for the services performed, amounted to, and as it was shown that she was eighteen years of age at the time she was injured it appears to us from all the proof that she had become liable for the payment of said bills, and in our opinion this instruction was not erroneous.

It is also contended that the court erred in refusing an instruction offered by appellant to the effect that, if the jury believed appellee knew the train was coming from the south and attempted to cross ahead of it and was on account of that fact injured, and if the jury further believed that in the exercise of due care she should not have attempted to cross the track, and that her conduct in so doing was negligence that contributed to her injury then the verdict should be for the defendant. There is no evidence in the record that appellee knew that the train was coming from the south and that she attempted to cross ahead of it. In the absence of any evidence in the record tending to show that she actually knew of the approach of the train from the south and attempted to cross ahead of it, it was proper to refuse this instruction.

An instruction in almost the identical language as the one been
claimed or was approved by the Supreme Court in the case of
Chicago Street Railway Co. vs. Kitzenbonn 180 Ill. 466, and Ott v.
Field Mfg. Co. 179 Ill. App. 255. However, in addition to this
instruction a further instruction was given in behalf of appellee which
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tions as a whole, the jury could not have been misled upon this question.

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of said bills, and in our opinion this instruction was not erroneous.

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it and was on account of that fact injured, and if the jury further
believed that in the exercise of due care she should not have attempted
to cross the track, and that her conduct in so doing was negligence that
contributed to her injury then the verdict should be for the defendant.
There is no evidence in the record that appellee knew that the train was
coming from the south and that she attempted to cross ahead of it.
In the absence of any evidence in the record tending to show that she
knew of the approach of the train from the south and attempted
to cross ahead of it, it was proper to refuse this instruction.

It is further contended that the amount of the verdict in this case is excessive. There was no denial of appellee's injuries. Her condition was testified to by the physician as well as by appellee, and in our opinion the amount allowed was not excessive. There being evidence in the record sufficient to warrant the verdict of the jury, and ~~being~~ no reversible error appearing in the giving or refusing of instructions or in the ruling of the court upon the evidence, the judgment should be and is affirmed.

AFFIRMED.

Not to be reported

It is further contended that the amount of the verdict in this case excessive. There was no denial of appellee's injuries. Her condition was testified to by the physician as well as by appellee, and in our opinion the amount allowed was not excessive. There being evidence in the record sufficient to warrant the verdict of the jury, and ----- appearing reversible error in the giving or refusing of instructions or in the the

Term No.24. Agenda No.38.

Appellate Court, Fourth District.

OCTOBER TERM, A.D.1926.

WILLIAM J. VEACH, Appellee	)	
v.	)	Appeal from City Court
J.W.STEGMEYER and C.D.ROBINSON,	)	EAST ST.LOUIS.
WEBER IMPLEMENT and AUTOMOBILE COMPANY, Appellant	)	

Opinion by Higbee, J.

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This case was before this court at the March Term, 1924 on which occasion a decree of the trial court in favor of appellee was reversed and the cause remanded. (Veach v.Stegmeyer, 233 Ill. App.559). In the opinion of this court filed in that case, is found a complete statement of the facts, out of which this suit arose. Upon the cause being redocketed in the trial court an amended bill was filed, and answers filed thereto by C.D.Robinson and Weber Implement and Automobile Company. Upon the second trial it was stipulated by appellee and the answering defendants that the evidence submitted before the Master in Chancery on the former trial should be considered as the evidence on this trial of the cause, together with such further evidence as should be furnished the special Master in Chancery by a date named. The additional evidence submitted, however, did not relate to the chattel mortgage given to appellee on the car involved in this suit or to the release thereof. Defendant J.W.Stegmeyer defaulted and a decree pro confesso was entered against him. On the hearing the court entered a decree finding that on the 12th day of July, 1921, J.W.Stegmeyer was indebted to appellee, W.J. Veach in the sum of $3825.00 for which he executed his promissory note and to secure the payment thereof, executed and delivered

Agenda No.38.

Appellate Court,Fourth District.

OCTOBER TERM,A.D.1926.

WILLIAM J. VEACH,

Appellee,

v.

STEGEMEYER and J.BOBINSON,

ELEMENT and AUTOMOBILE

Appellant.

Appeal from City Court

EAST ST.LOUIS.

Opinion by Higbee,J.

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This case was before this court at the March Term,1924 on which occasion a decree of the trial court in favor of appellee was reversed and the cause remanded. (Veach v.Stegemeyer,283 Ill. App.559). In the opinion of this court filed in that case,it found a complete statement of the facts,out of which this suit arose. Upon the cause being redocketed in the trial court an amended bill was filed,and answers filed thereto by C.D.Robinson and Weber Implement and Automobile Company. Upon the second trial it was stipulated by appellee and the answering defendants that the evidence submitted before the Master in Chancery on the former trial should be considered as the evidence on this trial of the cause,together with such further evidence as should be furnished the special Master in Chancery by a date named. The additional evidence submitted,however,did not relate to the chattel mortgage given to appellee on the car involved in this suit or to the release thereof. Defendant J.W.Stegemeyer defrauded and a decree pro confesso was entered against him. On the hearing the court entered a decree finding that on the 12th day of July ,1921,J.W.Stegemeyer was indebted to appellee,W.J. Veach in the sum of $3329.00 for which he executed his promissory note and to secure the payment thereof,executed and delivered

to appellee his chattel mortgage covering the automobile in question, known as "Lexington Car", No.25112, Motor No.41344" and two other cars; that on August 24, 1921, upon representations made by Stegmeyer, appellee executed and gave him a written release of said chattel mortgage, which Stegmeyer later, on September 7, 1921, without the knowledge or consent of appellee, filed for record, and the same was recorded in the office of the recorder of St.Clair county, Illinois; that appellant obtained possession of said automobile and sold it and retained the proceeds of the sale; that the reasonable market value of said automobile at the time appellant took possession of it was $2110.00. The court further found that the representations made to appellee by Stegmeyer when he secured the release of this chattel mortgage were false and fraudulent, and decreed that said release be cancelled and set aside and held for naught. It was further decreed that defendant J.W.Stegmeyer pay appellee the sum of $4669.68, being the amount of his note to appellee plus interest thereon to July 12, 1926; that appellant Weber Implement & Automobile Company pay appellee the sum of $2616.98, being the reasonable market value of the automobile as found by the court together with interest to the date last mentioned; that whatever amount if any, should be realized by appellee from said Weber Implement & Automobile Company be credited on the amount decreed to be due appellee from said defendant. From that decree this appeal has been perfected.

The principal ground argued by appellant for a reversal of this decree is that the evidence does not sustain the allegations of fraud on the part of said Stegmeyer. These allegations were that on July 24, 1921, following the execution of the chattel mortgage to appellee ~~on July 12, 1921~~, Stegmeyer represented to appellee that he had a purchaser for the Lexington automobile covered by the mortgage; that he would be unable to sell

to appellee his chattel mortgage covering the automobile in question known as "Lexington Car", No.2D112,Motor No.4125447 and two other cars; that on August 24,1921,upon representations made by Stegemyer appellee executed and gave him a written release of said chattel mortgage which Stegemyer later,on September 1,1921,without the knowledge or consent of appellee,filed for record and the same was recorded in the office of the recorder of St.Clair county,Illinois; that appellant obtained possession of said automobile and sold it and retained the proceeds of the sale; that the reasonable market value of said automobile at the time appellant took possession of it was $2110.00. The court further found that the representations made to appellee by Stegemyer when he secured the release of this chattel mortgage were false and fraudulent,and decreed that said release be cancelled and set aside and held for naught. It was further decreed that defendant J.W.Stegemyer pay appellee the sum of $4669.68,being the amount of his note to appellee plus interest thereon to July 12,1926; that appellant Weber Implement & Automobile Company pay appellee the sum of $2516.98, being the reasonable market value of the automobile as found by the court together with interest to the date last mentioned; that whatever amount if any,should be realized by appellee from said Weber Implement & Automobile Company be credited on the amount decreed to be due appellee from defendant. From that decree this appeal has been perfected.

The principal ground argued by appellant for a reversal of this decree is that the evidence does not sustain the allegations of fraud on the part of said Stegemyer. These allegations were that on July 24,1921,following the execution of the chattel mortgage to appellee [redacted] Stegemyer represented to appellee that he had a purchaser for the Lexington automobile covered by the mortgage; that he would be unable to sell

the same unless appellee would release the automobile from the lien of his mortgage; that he requested appellee to execute and deliver to him such release; that Stegmeyer promised appellee to dispose of the automobile and turn the amount realized therefrom to appellee; ~~and~~ that relying upon ~~the doctrine of~~ those representations, and believing that Stegmeyer would sell the automobile and turn the proceeds over to him, appellee executed and delivered the release to Stegmeyer; ~~and~~ that without selling the automobile or paying appellee any amount, Stegmeyer, on the 17th day of September, 1921 filed the release for record. These facts were testified to by both appellee and Stegmeyer. It is not the contention of appellant that these facts are not shown, but that they do not amount to fraud. In our opinion these statements by Stegmeyer amount to fraud in law. As a general principal a release or discharge of a mortgage obtained through fraud will, as between the parties, be held inoparative. (Henschel v. Mamero, ~~18~~ 120 Ill.660.)

In our former opinion we held that the contract note signed by Stegmeyer purporting to pledge certain automobiles to the Weber Implement and Automobile Company as security for indebtedness owing by him to appellant, was invalid because not acknowledged or filed for record. Appellant therefore acquired no lien against this automobile in question by virtue thereof, and in our opinion the trial court properly held the release in question to be void as against appellee. Appellant further contends that even though the said contract note was void as a chattel mortgage it amounted to a conditional sale; that the title to the car in question was in the Weber Implement and Automobile Company, and therefore the chattel mortgage to appellee was not a prior lien thereon. It is not clearly proved that this automobile was originally included among those named in the contract note but even if it was, in our opinion, the giving of

same unless appellee would release the automobile from the lien of his mortgage; that he requested appellee to execute and deliver to him such release; that Stegmeyer promised appellee to dispose of the automobile and turn the amount realized therefrom to appellee; that relying upon those representations, and believing that Stegmeyer would sell the automobile and turn the proceeds over to him, appellee executed and delivered the release to Stegmeyer; that without selling the automobile or paying appellee any amount, Stegmeyer, on the 17th day of September, 1921 filed the release for record. These facts were testified to by both appellee and Stegmeyer. It is not the contention of appellant that these facts are not shown, but that they do not amount to fraud. In our opinion these statements by Stegmeyer amount to fraud in law. As a general principal a release or discharge of a mortgage obtained through fraud will, as between the parties, be held inoperative. (Hasbrook v. Wamsley, 120 Ill. 660.)

In our former opinion we held that the contract note signed by Stegmeyer purporting to pledge certain automobiles to the Weber Implement and Automobile Company as security for indebtedness owing by him to appellant, was invalid because not acknowledged or filed for record. Appellant therefore acquired no lien against this automobile in question by virtue thereof, and in our opinion the trial court properly held the release in question to be void as against appellee. Appellant further contends that even though the said contract note was void as a chattel mortgage it amounted to a conditional sale; that the title to the car in question was in the Weber Implement and Automobile Company, and therefore the chattel mortgage to appellee was not a prior lien thereon. It is not clearly proved that this automobile was originally included among those named in the contract note but even if it was, in our opinion, the giving of

this note by Stegmeyer to appellant can in no event, be a conditional sale to appellant, for the reason that the evidence shows this note was not given to appellant to secure the purchase price of the car, but was given for money which appellant advanced to Stegmeyer, and in our opinion was never intended by the parties as a conditional sale. Appellant also argues that the decree is excessive in its finding of the market value of the car in question. The finding of the market value of the car was based upon the testimony of appellee and Stegmeyer, who, while they did not qualify very clearly as experts on such values, appear to have been advised to the actual value of this car.

We think their testimony was properly admitted and was sufficient to sustain the finding of the court as to the value of the car in question. In our opinion the proof supports the report of the special master in chancery and the decree of the court, which should be and accordingly is affirmed.

Affirmed.

Not to be reported

this note by Stegmeyer to appellant can in no event be a conditional sale to appellant for the reason that the evidence shows this note was not given to appellant to secure the purchase price of the car, but was given for money which appellant advanced to Stegmeyer, and in our opinion was never intended by the parties as a conditional sale. Appellant also argues that the decree is excessive in its finding of the market value of the car in question. The finding of the market value of the car was based upon the testimony of appellee and Stegmeyer, who, while they did not qualify very clearly as experts on such values, seem to have been advised to the actual value of this car.

We think their testimony was properly admitted and was sufficient to sustain the finding of the court as to the value of the car in question. In our opinion the proof supports the report of the special master in chancery and the decree of the court, which should be and accordingly is affirmed.

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Term No.31. Agenda No.23.

APPELLATE COURT, FOURTH DISTRICT.

OCTOBER TERM, A.D.1926.

ALBERT KELL, Appellee	)	
v.	)	Appeal from MARION.
THOMAS J.ARMSTRONG, SYLVESTER C. GARRISON, firm of ARMSTRONG & GARRISON, Appellants.	)	

Opinion by Higbee, J.

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Albert Kell, appellee, brought suit against Thomas J.Armstrong and Sylvester C.Garrison, partners, doing business under the name of Armstrong & Garrison, appellants, to recover damages for the breach of a contract which appellee claims he made with one Frank Schwartz as agent of appellant for the purchase by appellant of appellee's crop of pears in the year 1925. Upon a trial before a jury appellee recovered a verdict for $140.00. A motion for new trial was overruled and by this appeal the appellants seek to reverse the judgment entered on that verdict.

On the trial appellee testified, in substance, that in 1924 he sold his pears to appellants through Frank Schwartz as their agent; that in that year he did not talk to anyone except Schwartz and his pears were received by appellant's loader, Mr. Reynolds. He was permitted over objection of appellants to go into details as to the 1924 transaction which was in substance that the pears were sold to appellants through Schwartz and were paid for by appellants. He also testified that in 1925 he had numerous conversations with Schwartz, in which Schwartz in substance told him not to sell his pears until he "got our prices" and that Schwartz said "Armstrong & Garrison treated you good last year, let them have the pears this year for they will do as well this year as any

Term No.31. Agenda No.23.

THE APPELLATE COURT, FOURTH DISTRICT.

OCTOBER TERM, A.D.1926.

ALBERT KELL,

Appellee

v.

THOMAS J. ARMSTRONG, SYLVESTER C. GARRISON, firm of ARMSTRONG & GARRISON,

Appellants.

Appeal from MARION

Opinion by Higbee, J.

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Albert Kell, appellee, brought suit against Thomas J. Armstrong and Sylvester C. Garrison, partners, doing business under the name of Armstrong & Garrison, appellants, to recover damages for the breach of contract which appellee claims he made with one Frank Schwartz as agent of appellants for the purchase by appellants of appellee's crop of pears in the year 1925. Upon a trial before a jury appellee recovered a verdict for $1400.00. A motion for new trial was overruled and this appeal the appellants seek to reverse the judgment entered on that verdict.

On the trial appellee testified, in substance, that in 1924 he sold his pears to appellants through Frank Schwartz as their agent; that in that year he did not talk to anyone except Schwartz and his pears were received by appellants leader, Mr. Seymour. He was permitted over objection of appellants to go into detail as to the 1924 transaction which was in substance that the pears were sold to appellants through Schwartz and were paid for by appellants. He also testified that in 1925 he had numerous conversations with Schwartz, in which Schwartz in substance told him not to sell his pears until he "got our prices" and that Schwartz said "Armstrong & Garrison treated you good last year, let them have the pears this year for they will do as well this year as any

one else;" that this conversation in substance was had several times. He also testified that following this conversation he took a portion of the early variety of his pears to appellants at Alma and was paid for them, but that appellants refused to accept and pay for his other pears. He was also further permitted to testify that after appellants refused to accept his pears he went to Schwartz and asked Schwartz if he was authorized to buy pears for appellants, and that Schwartz said he certainly was. Appellee's brother testified that he heard the conversation between appellee and Schwartz prior to the time the 1925 crop was harvested in which Schwartz urged appellee to let appellants have his pears. This was the only proof tending to show that Schwartz was the agent of appellants.

In behalf of appellants Schwartz denied that he bought any pears in 1924 from appellee for appellants. He also denied that he ever told appellee in 1925 that he was buying pears for appellants and denied having any conversation with appellee relative to buying his pears. Both of appellants denied that Schwartz had any authority to purchase pears for them. Other employes of appellant who were looking after the loading of pears appellants had purchased, testified that while some of appellee's pears were received others were rejected at the car because they did not come up to the standard required. It was incumbent upon appellee to prove that Schwartz was authorized to purchase pears as the agent of appellants. The doctrine that the statements of Schwartz himself were not competent to prove his agency is so well established that it is unnecessary to cite authorities so holding. It is sufficient to say that under a well established rule of law, it was error for the court to permit appellee to testify to the statements of Schwartz that he was appellant's agent. Even if these statements were competent, in our opinion, the preponderance of evidence does not show that Schwartz was the agent of appellants. The evidence

one else;" that this conversation in substance was had several times. He also testified that following this conversation he took a portion of the early variety of his pears to appellants at Alma and was paid for them, but that appellants refused to accept and pay for his other pears. He was also further permitted to testify that after appellants refused to accept his pears he went to Schwarts and asked Schwarts if he was authorized to buy pears for appellants, and that Schwarts said he certainly was. Appellees brother testified that he heard the conversation between appellee and Schwarts prior to the time the 1925 crop was harvested in which Schwarts urged appellee to let appellants have his pears. This was the only proof tending to show that Schwarts was the agent of appellants.

In behalf of appellants Schwarts denied that he bought any pears in 1924 from appellee for appellants. He also denied that he ever told appellee in 1925 that he was buying pears for appellants and denied having any conversation with appellee relative to buying his pears. Both of appellants denied that Schwarts had any authority to purchase pears for them. Other employees of appellant who were looking after the loading of pears appellants had purchased, testified that while some of appellee's pears were received others were rejected as the car because they did not come up to the standard required. It was incumbent upon appellee to prove that Schwarts was authorized to purchase pears as the agent of appellants. The doctrine that the statements of Schwarts himself were not competent to prove his agency is so well established that it is unnecessary to cite authorities on holding. It is sufficient to say that under a well established rule of law, it was error for the court to permit appellee to testify to the statements of Schwarts that he was appellant's agent. Even if these statements were competent, in our opinion, the preponderance of evidence does not show that Schwarts was the agent of appellants. The evidence

introduced on the part of appellants shows that while they did receive some of appellees pears at the car the others were rejected because they did not come up to the standard required. Appellants claim that certain instructions given in behalf of appellee were erroneous in that they assumed as true certain facts which should have been left to the determination of the jury. In our opinion, with the exception of the 5th instruction, the criticism made is not well founded. That instruction in substance was that if the jury believed from the preponderance of the evidence appellants entered into a contract with appellee agreeing to purchase appellee's 1925 crop at the price named, upon the same terms concerning the size and condition of the pears as had governed in the purchase of the preceding years crop that appellee held his pear crop until notified by appellants and thereupon made arrangements to deliver his crop to appell~~ees~~ants at the car, and if the jury further believed from a preponderance of the evidence that appell~~ees~~ants received one load of the pears and then refused to receive any more, and the jury further believed that appellee was then and there ready, willing and able to deliver the remainder of his pears subject to the contract but that appellants refused to receive them, then appellants would be liable for their non-performance .

This instruction it seems to us does assume that appellants had purchased appellee's pear crop in preceding years, which was a material fact to be left to the jury. It is also erroneous for the reason that it omits the element that appellee's pears refused by appellant ~~would have~~ were required to be of the standard required by the contract, before appellants would be liable for refusing to receive them, even though the contract as claimed by appellees had been made. This was a very material point in the trial of this case, and being so material it should have been

introduced on the part of appellants shows that while they did receive some of appellees pears at the car the others were rejected because they did not come up to the standard required. Appellants claim that certain instructions given in behalf of appellee were erroneous in that they assumed as true certain facts which should have been left to the determination of the jury. In our opinion, with the exception of the 5th instruction, the criticism made is not well founded. That instruction in substance was that if the jury believed from the preponderance of the evidence appellants entered into a contract with appellee agreeing to purchase appellee's 1025 crop at the price named, upon the same terms concerning the size and condition of the pears as had governed in the purchase of the preceding years crop that appellee held his pear crop until notified by appellants and thereupon made arrangements to deliver his crop to appellees at the car, and if the jury further believed from a preponderance of the evidence that appellees received one load of the pears and then refused to receive any more, and the jury further believed that appellee was then and there ready, willing and able to deliver the remainder of his pears subject to the contract but that appellants refused to receive them, then appellants would be liable for their non-performance.

This instruction it seems to us does assume that appellants had purchased appellee's pear crop in preceding years, which was a material fact to be left to the jury. It is also erroneous for the reason that it omits the element that appellee's pears refused by appellant were of the standard required by the contract. Before appellants would be liable for refusing to receive them, even though the contract as claimed by appellees had been made. This was a very material point in the trial of this case, and being so material it should have been

included in this instruction which in effect is a mandatory instruction.

For the reasons herein given this judgment must be reversed and the cause remanded.

Reversed and Remanded.

Not to be reported

Term No.35. Agenda No.29.

APPELLATE COURT, FOURTH DISTRICT.

OCTOBER TERM, A.D.1926.

CLAUDE WELCH, a Minor, by C.W.WHITE, his next friend, Appellee	)	Appeal from City Court EAST ST.LOUIS.
v.	)	
PENNSYLVANIA RAILROAD COMPANY, Appellant	)	

Opinion by Higbee, J.

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Appellee Claude Welche, a minor, by C.W.White, his next friend, filed a suit in trespass on the case against Pennsylmanie Railroad Company, appellant, in the city court of East St.Louis, Illinois, to recover damages on account of the destruction of his automobile alleged to have occurred because of the negligence of appellant's crossing watchman..

The accident in question occurred at a point where a public road known as Kings Highway running approximately north and south, crosses appellant's railroad tracks at right angles. At the crossing in question the Baltimore and Ohio railroad has two tracks and the appellant company eleven.. The tracks of the Baltimore and Ohio Railroad Company are south of those of the appellant, the north rail of the Baltimore & Ohio tracks, being about 127 feet south of the south rail of appellant's tracks. Appellant's south track is known as its main east bound track and the next track north as its main west bound track.. The other nine tracks just north of these two are switch tracks. The Baltimore & Ohio tracks are some ten or twelve feet higher than the highway to the south thereof and two feet higher, as it appears from the evidence, than appellant's tracks, so that there is a decline from the Baltimore &

Term No.35. Agenda No.25.

APPELLATE COURT, FOURTH DISTRICT.

OCTOBER TERM, A.D.1926.

CLAUDE WELCH, a Minor, by
C.W.WHITE, his next friend,

Appellee,

v.

PENNSYLVANIA RAILROAD COMPANY,

Appellant.

Appeal from City Court
EAST ST.LOUIS.

Opinion by Higbee, J.

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Appellee Claude Welch, a minor, by C.W.White his next friend, filed a suit in trespass on the case against Pennsylvania Railroad Company, appellant, in the city court of East St.Louis, Illinois, to recover damages on account of the destruction of his automobile alleged to have occurred because of the negligence of appellant's crossing watchman.

The accident in question occurred at a point where a public road known as Kings Highway running approximately north and south, crosses appellant's railroad tracks at right angles. At the crossing in question the Baltimore and Ohio railroad has two tracks and the appellant company eleven. The tracks of the Baltimore and Ohio Company are south of those of the appellant, the north rail of the Baltimore & Ohio track being about 127 feet south of the south rail of appellant's tracks. Appellant's south track is known as the main east bound track and the next track north as the main west bound track. The other nine tracks just north of these two are switch tracks. The Baltimore & Ohio tracks are some ten or twelve feet higher than the highway to the south thereof and two feet higher, as it appears from the evidence, than appellant's tracks, so that there is a decline from the Baltimore &

Ohio tracks north to appellant's tracks of about two feet. Appellee testified that about 9 o'clock on the evening of December 4,1925 he,with a Miss Frances Huskamp,in his Cole automobile,came from the south on Kingshighway and after reaching the top of the Baltimore & Ohio tracks,started down the incline to appellants tracks; that at the time he crossed the Baltimore and Ohio tracks he was,going about three miles per hour; that his brakes were good, and he could ha ve stopped within one foot.. Appellant maintains a watchman at this crossing who has a building,referred to as the watchman's shanty,just South of its south track and on the west side of the highway. Appellee testified,as he came over the B.& O. tracks appellant's watchman was standing opposite his shanty waving a pole with a paper on it which he understood to be a signal to stop and that he did so; that at that time a string of cars was moving across the highway on one of appellant's tracks; that there was sufficient space between appellant's tracks and the Baltimore and Ohio tracks to the south but he was about a foot from appellant's tracks when he stopped his car; that it was fifteen or twenty feet from the north Baltimore and Ohio track to appellant's south track; The proof however shows that by actual measurement that distance is a little more than 127 feet; He further testified that when the string of cars cleared the highway the watchman motioned for him to come ahead but that his engine had died; that for about ten minutes he attempted to start the car with his starter,but finally ran down his battery; that during this time the watchman asked him what his trouble was and he told him his engine had stalled; that the watchman then left and he did not see him until after the accident. Appellee further testified that after he had exhausted his battery he attempted to start his engine by cranking the car, but was unable to do so; that he then stood by the side of the car talking to his friend for about fifteen minutes and decided to try to start his car by pushing it on down the incline; that his

Ohio tracks north to appellant's tracks of about two feet. Appellee testified that about 7 o'clock on the evening of December 4,1925 he,with a Miss Frances Hunkamp,in his Ford automobile,came from the south on Kingsbigway and after reaching the top of the Baltimore & Ohio tracks,started down the incline to appellants tracks; that at the time he crossed the Baltimore and Ohio tracks he was going about three miles per hour; that his brakes were good, and he could ha ve stopped within one foot. Appellant maintains a watchman at this crossing who has a building,referred to as the watchman's shanty,just South of its south track and on the west side of the highway. Appellee testified,as he came over the B.& O. tracks appellant's watchman was standing opposite his shanty waving a pole with a paper on it which he understood to be a signal to stop and that he did so; that at that time a string of cars was moving across the highway on one of appellant's tracks; that there was sufficient space between appellant's tracks and the Baltimore and Ohio tracks to the south but he was about a foot from appellant's tracks when he stopped his car; that it was fifteen or twenty feet from the north Baltimore and Ohio track to appellant's south track; The proof however shows that by actual measurement that distance is a little more than 127 feet; that when the string of cars cleared the highway the watchman motioned for him to come ahead but that his engine had died; that for about ten minutes he attempted to start the car with his starter,but finally ran down his battery; that during this time the watchman asked him what his trouble was and he told him his engine had stalled; that the watchman then left and he did not see him until after the accident. Appellee further testified that after he had exhausted his battery he attempted to start his engine by cranking the car, but was unable to do so; that he then stood by the side of the car talking to his friend for about fifteen minutes and decided to try to start his car by pushing it on down the incline; that his

friend then took the driver's seat on the left hand side, or west side of the car, and that he went to the rear to push it; that just as he got to the rear of the car, his car was struck by appellant's fast mail train coming from the west. Miss Huskamp corroborated appellee and testified that when he was cranking the car he was compelled to stand between the rails of appellant's track; that as appellee started to the rear of the car she moved from the right hand side over to the driver's seat on the left hand side so as to steer the car while it was being pushed by appellee; that just as she got in the driver's seat she saw appellant's train approaching from the west and that she then moved over to the east side of the car and jumped out; that the next thing she knew the car was struck by the train and she was standing by the side of appellee. Appellant's watchman testified that he remembered signalling appellee to stop; that he was then standing in front of his shanty on the west side of the highway; that he signalled when appellee's car came over the Baltimore and Ohio tracks and continued to signal until he stopped; that when appellee stopped the front of his automobile was ten or twelve feet south of appellant's tracks; that he signalled appellee to stop because of the freight train that was coming from the west. The watchman further testified that as soon as appellee stopped he stepped back over to the east side of the shanty to get out of the wind; that after the freight cars had passed he walked down to the main line to see if any other cars were approaching, and upon finding they were not, gave appellee the signal to go ahead; that appellee was unable to start his automobile and got out and raised the hood of the machine and at this time there were no lights burning on the car; that he then went north over some of the other tracks and some ten or fifteen minutes later returned to the main lines finding appellee still there trying to start

friend then took the driver's seat on the left hand side, or west side of the car, and that he went to the rear to push it; that just as he got to the rear of the car, his car was struck by appellant's fast mail train coming from the west. Miss Hankamp corroborated appellee and testified that when he was cranking the car he was compelled to stand between the rails of appellant's track; that as appellee started to the rear of the car she moved from the right hand side over to the driver's seat on the left hand side so as to steer the car while it was being pushed by appellee; that just as she got in the driver's seat she saw appellant's train approaching from the west and that she then moved over to the east side of the car and jumped out; that the next thing she knew the car was struck by the train and she was standing by the side of appellee. Appellant's watchman testified that he remembered signalling appellee to stop; that he was then standing in front of his shanty on the west side of the highway; that he signalled when appellee's car came over the Baltimore and Ohio tracks and continued to signal until he stopped; that when appellee stopped the front of his automobile was ten or twelve feet south of appellant's tracks; that he signalled appellee to stop because of the freight train that was coming from the west. The watchman further testified that as soon as appellee stopped he stepped back over to the east side of the shanty to get out of the wind; that after the freight cars had passed he walked down to the main line to see if any other cars were approaching, and finding they were not, gave appellee the signal to go ahead; that appellee was unable to start his automobile and got out and raised the hood of the machine and at that time there were no lights burning on the car; that he then went north over some of the other tracks and some ten or fifteen minutes later returned to the main lines finding appellee still there trying to start

his automobile; that he heard the passenger train whistle to the west while he was standing between the two south main tracks and began to wave his red lantern across the highway; that at this time appellee's automobile was in the same position as before, about twn or twenve feet south of appellant's south track; that he then saw the car was being pushed up on the crossing and called to appellee, who stuck his head out from behind the machine and looked around, that the automobile was then struck by appellant's train..

The testimony of the watchman was corroborated by E.C.Craig, a patrolman for appellant, who testified that he was about 80 feet from where the accident happened, seven tracks away to the north and that while from where he stood he could not tell exactly where the automobile had stopped, it appeared to him to be from ten or twelve feet south of appellant's south track; that he saw appellee pushing the car and it appeared to be moving toward the north although he could not tell whether the automobile was on the crossing or not.. This witness further testified that he later had a conversation with appellee in which he told witness he was trying to start the car by pushing it down the incline toward the appellant's main line track, when the accident happened. Appellant's engineer of the train which struck appellee's automobile testified, that as he approached and whistled for the crossing and when about two or three hundred feet from it he saw what appeared to be an automobile moving on to the crossing and that it moved out until the windshield was even with the south rail and then stopped; that he applied the emergency brakes which were in working order, but was unable to avoid the collision as the train was travelling at that time about 35 miles an hour and could not be stopped in less than 600 feet. His statement concerning the application of the brakes was corroborated by other members of the train crew. After the train was stopped

his automobile, that he heard the passenger train whistle to the west while he was standing between the two south main tracks and began to wave his red lantern across the highway; that at that time appellee's automobile was in the same position as before, about two or twenty feet south of appellant's south track; that he then saw the car was being pushed up on the crossing and called to appellee who stuck his head out from behind the machine and looked around, that the automobile was then struck by appellant's train.

The testimony of the watchman was corroborated by E.C.Craig, a railroadman for appellant, who testified that he was about 80 feet from where the accident happened, seven tracks away to the north and that while from where he stood he could not tell exactly where the automobile had stopped, it appeared to him to be from ten or twelve feet south of appellant's south track; that he saw appellee pushing the car and it appeared to be moving toward the north although he could not tell whether the automobile was on the crossing or not. This witness further testified that he later had a conversation with appellee in which he told witness he was trying to start the car by pushing it down the incline toward the appellant's main line track, when the accident happened. Appellant's engineer of the train which struck appellee's automobile testified that as he approached and whistled for the crossing and when about two or three hundred feet from it he saw what appeared to be an automobile moving on to the crossing and that it moved out until the windshield was even with the south rail and then stopped; that he applied the emergency brakes which were in working order, but was unable to avoid the collision as the train was travelling at that time about 30 miles an hour and could not be stopped in less than 600 feet. His statement concerning the application of the brakes was corroborated by other members of the train crew. After the train was stopped

some of the crew went back to the scene of the accident. Appellant's conductor testifiedtnat he there had a conversation with appellee in which appellee told him his car stopped between the Baltimore and Ohio and appellant's tracks and that he, in attempting to push it over the track, pushed it in front of the train. This is substantially all the testimony in the record as to what actually happened at the time of the accident, and we have set it forth at some length, because no complaint is made in appellant's argument ofthe ruling of the court in regard to the evidence or instructions and the arguments on both sides are almost wholly devoted to a discussion of the question whether the verdict of the jury was warranted by the proof in the case.

In our opinion this evidence satisfactorily shows that appellee's car was in a safe position when the watchman left him. It was no part of the watchman's duty to see that appellee did not afterwards get his automobile into a dangerous position. (Fuller v. P.&.P.Union Ry.Co., 164 Ill.App.385). It is charged in two counts of the declaration that appellant's watchman ordered appellee to stop and come to a standstill on the railroad track and crossing. There is no proof whatever to sustain this averment and appellee's own testimony is that he stopped within one foot of the tracks. The preponderance of the evidence does not show that the watchman was guilty of any negligence in stopping appellee, or that he failed in the performance of any duty he or appellant owed to appellee. We are also of opinion that the greater weight of the evidence showed that appellee was attempting to start his car by pushing it down and onto appellant's tracks when the accident happened. Not only does the testimony of appellant's witnesses tend to show this fact, but we are of the opinion the circumstances, as testified to by appellee and his companion, ~~is~~ are also to this effect. This would seem to us under the circumstances of this case, as disclosed by the record, to plainly show contributory

one of the crew went back to the scene of the accident. Appellant's witness testified that he there had a conversation with appellee in which appellee told him his car stopped between the Baltimore and Ohio and appellant's tracks and that he, in attempting to push it over the track, pushed it in front of the train. This is substantially all the testimony in the record as to what actually happened at the time of the accident. We have set it forth at some length because no complaint is made in appellant's argument of the ruling of the court in regard to the evidence or instructions and the arguments on both sides are almost wholly devoted to a discussion of the question whether the verdict of the jury was warranted by the proof in the case.

In our opinion this evidence satisfactorily shows that appellee's car was in a safe position when the watchman left him. It was no part of the watchman's duty to see that appellee did not afterward get his automobile into a dangerous position. (Muller v. B.&O. Union Ry.Co., 164 Ill.App.380). It is charged in two counts of the declaration that appellant's watchman ordered appellee to stop and come to a standstill on the railroad track and crossing. There is no proof whatever to sustain this averment and appellee's own testimony is that he stopped within one foot of the tracks. The preponderance of the evidence does not show that the watchman was guilty of any negligence in stopping appellee, or that he failed in the performance of any duty he or appellant owed to appellee. We are also of opinion that the greater weight of the evidence showed that appellee was attempting to start his car by pushing it down and onto appellant's tracks when the accident happened. Not only does the testimony of appellant's witnesses tend to show this fact, but we are of the opinion the circumstances as testified to by appellee and his companion also to this effect. This would seem to us under the circumstances of this case as disclosed by the record, to plainly show contributory

negligence on the part of appellee.

We conclude that the preponderance of the evidence in this case did not support the verdict for appellee and the judgment must therefore be reversed and the cause remanded.

Reversed and Remanded.

Not to be reported

Term No.37. Agenda No.14.

APPELLATE COURT,FOURTH DISTRICT,

OCTOBER TERM A.D. 1926.

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HENRY PINKSTAFF et al,)
Appellees)
v.) Appeal from LAWRENCE.
JAMES PINKSTAFF,)
Appellant.)

Opinion by Higbee,J.

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This is an action in assumpsit brought by Henry Pinkstaff and his wife,Ella Pinkstaff,appellees,against James Pinkstaff,appellant. On trial before a jury a verdict was returned in favor of appellees,in the sum of $329.34,and this appeal was perfected to reverse the judgment entered on that verdict.

The evidence shows that appellee,Henry Pinkstaff and appellant James Pinkstaff are sons of Anna Pinkstaff,deceased,the widow of Martin V.Pinkstaff who died about 1904,leaving said Henry Pinkstaff and James Pinkstaff,together with Charles Pinkstaff and Susan Wampler as his only children. This suit was brought to recover for the attention and care given said Anna Pinkstaff by appellees,under an alleged contract claimed to have been made on February 3,1922 between appellees,appellant and Charles Pinkstaff. On the trial appellees testified that Anna Pinkstaff had made her home with them in the year 1919 and they had cared for her until her death on December 3,1922. Appellee,Henry Pinkstaff, testified that on February 3,1922 ,his brothers Charles and James came to his home at his request,and that he and his wife then told his brothers that they would have to pay for keeping and caring for the mother; that appellant wanted to know what the "price was"; that witness told him it would be ten dollars a week when she was

Term No.37. Agenda No.11.

APPELLATE COURT,FOURTH DISTRICT.

OCTOBER TERM A.D. 1924.

HENRY PINKS APP'et)
Appellees)
v.) Appeal from LAWRENCE.
JAMES PINKSTAFF,)
Appellant.)

Opinion by Higbee,J.

This is an action in assumpsit brought by Henry Pinkstaff and his wife,Ella Pinkstaff,appellees,against James Pinkstaff,appellant. On trial before a jury a verdict was returned in favor of appellees in the sum of $329.34,and this appeal was perfected to reverse the judgment entered on that verdict.

The evidence shows that appellee, Henry Pinkstaff and appellant James Pinkstaff are sons of Anna Pinkstaff,deceased,the widow of Martin V.Pinkstaff who died about 1904,leaving said Henry Pinkstaff and James Pinkstaff,together with Charles Pinkstaff and Susan Wampler as his only children. This suit was brought to recover for the attention and care given said Anna Pinkstaff by appellees,under an alleged contract claimed to have been made on February 3,1922 between appellees,appellant and Charles Pinkstaff. On the trial appellees testified that Anna Pinkstaff had made her home with them in the year 1919 and they had cared for her until her death on December 3,1922. Appellee,Henry Pinkstaff,testified that on February 3,1922 ,his brothers Charles and James came to his home at his request,and that he and his wife then told his brothers that they would have to pay for keeping and caring for the mother; that appellant wanted to know what the "price was" that witness told him it would be ten dollars a week when she was

up and around the house and twenty five dollars when she was down in bed; that appellant said he could not keep her and that he would pay his part; that appellant further said if they would go ahead and keep her the rest of the time she lived they would pay appellees what was then due them "back pay and all"; that they counted up the time and found the mother had then been with appellees thirty two (32) months and appellant said "all right"; that there were four children then living and appellant said he would pay one-fourth part of the amount there agreed upon to be charged by appellees; that it was agreed by those present that each child should pay one-fourth of said charges but that Susan Wampler was not present to join in the agreement. Austin Pinkstaff, a son of appellees, testified that he was present and heard the agreement made and that it was as stated by his father. It appears that Charles Pinkstaff later signed a written contract to pay his share but the evidence shows that appellant on at least two occasions thereafter refused to sign such a written contract, stating that he had not agreed thereto. This suit was brought against appellant to recover on the alleged verbal contract. Appellant denied that such an agreement had been made at all and in this was to a large extent, corroborated by his brother, Charles.

Practically all of appellant's argument is devoted to the contention that the evidence does not show the agreement was entered into, and that appellee's testimony does not show any consideration for such a contract, so far as pay for the 32 weeks prior to the alleged making of the contract, is concerned. The evidence as to whether or not this agreement was entered into is directly contradictory, and it was within the peculiar province of the jury to decide what witnesses they were going to believe. They accepted the testimony of appellees ~~and his witnesses~~. The trial judge, who saw and heard the witnesses testify, by overruling the motion for new trial, was of the opinion the verdict should

up and around the house and twenty five dollars when she was down in bed; that appellant said he could not keep her and that he would pay his part; that appellant further said if they would go ahead and keep her the rest of the time she lived they would pay appellees what was then due them "back pay and all"; that they counted up the time and found the mother had then been with appellees thirty two (32) months and appellant said "all right"; that there were four children then living and appellant said he would pay one-fourth part of the amount there agreed upon to be charged by appellees; that it was agreed by those present that each child should pay one-fourth said [illegible] but that Susan Wampler was not present to join in the agreement. Austin Pinkstaff, a son of appellees, testified that he was present and heard the agreement made and that it was as stated by his father. It appears that Charles Pinkstaff later signed a written contract to pay his share but the evidence shows that appellant on at least two occasions thereafter refused to sign such a written contract, stating that he had not agreed thereto. This suit was brought against appellant to recover on the alleged verbal contract. Appellant denied that such an agreement had been made at all and in this was to a large extent corroborated by his brother, Charles. Practically all of appellant's argument is devoted to the contention that the evidence does not show the agreement was entered into, and that appellee's testimony does not show any consideration for such a contract, so far as pay for the 32 weeks prior to the alleged making of the contract, is concerned. The evidence as to whether or not this agreement was entered into is directly contradictory, and it was within the peculiar province of the jury to decide what witnesses they were going to believe. They accepted the testimony of appellees and [illegible]. The trial judge, who saw and heard the witnesses testify, by overruling the motion for new trial, was of the opinion the verdict should

stand. There was proof to warrant this verdict and this court cannot hold that it is so manifestly against the weight of the evidence that the judgment based upon it, should be reversed.

If appellee Henry Pinkstaff's testimony is considered as true, there was a consideration to support the agreement to pay for the services already rendered at the time it is claimed the contract was made, since he swore that appellant agreed that if appellees would continue to keep and care for the mother until her death he, appellant, would pay his share of the amounts mentioned not only for such time as she would continue to live, but for the 32 months prior thereto.

The only other ground urged by appellant in his argument for a reversal of this judgment is the fact that nine instructions offered by appellant and refused by the court should have been given since they stated the law applicable to the matters of defense. He does not, however, assist us by indicating wherein the trial court erred in refusing the instructions but asks this court to examine them and "see how important they were to the defendant". In compliance with this request we have examined these instructions and have failed to find that the court committed any error in refusing them that would call for a reversal of the judgment.

Judgment affirmed.

Not to be reported

stand. There was proof to warrant this verdict and this court cannot hold that it is so manifestly against the weight of the evidence that the judgment based upon it should be reversed.

If appellee's testimony is considered as true, there was a consideration to support the agreement to pay for the services already rendered at the time it is claimed the contract was made, since he swore that appellant agreed that if appellee would continue to keep and care for the mother until her death he, appellant, would pay his share of the amounts mentioned not only for such time as she would continue to live, but for the 32 months prior thereto.

The only other ground urged by appellant in his argument for a reversal of this judgment is the fact that nine instructions offered by appellant and refused by the court should have been given since they stated the law applicable to the matters of defense. We does not, however, assist us by indicating wherein the trial court erred in refusing the instructions but asks this court to examine them and "see how important they were to the defendant". In compliance with this request we have examined these instructions and have failed to find that the court committed any error in refusing them that would call for a reversal of the judgment.

Judgment affirmed.

Term No.58. Agenda No.11.

Appellate Court, Fourth District.

October Term, A.D.1926.

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JENNIE KERINS, Appellee.	)	
v.	)	Appeal from
JAMES R.PRUITT and MARTHA G. PRUITT, his wife, HENRY T.RENSHAW, Trustee, HENRY BERGMAN and THERESA LOUISE BERGMAN, his wife, and PETER WITTENAUER,	)	ST.CLAIR.
(HENRY BERGMAN and THERESA LOUISE BERGMAN), Appellants)	)	

Opinion by Higbee, J.

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This is an appeal by Henry Bergman and Theresa Louise Bergman from a decree of the circuit court of St.Clair county, rendered on a bill for foreclosure filed by Jennie Kerins, appellee.

It appears from the record that on October 8,1918, James R.Pruitt and Martha G.Pruitt, his wife, executed a mortgage on certain premises in the City of East St.Louis to Henry T.Renshaw, trustee, securing the payment of a promissory note for $950. This mortgage was recorded November 14,1918 and shortly thereafter Renshaw sold the note and mortgage to appellee. No assignment of the same was placed upon record, but Renshaw endorsed the note and delivered it together with the mortgage, to appellee who has since that time retained possession thereof. Until April 8,1920, Renshaw collected the interest on this mortgage indebtedness, and paid the same to appellee. On March 28,1919. the Pruitts by warranty deed conveyed the premises covered by this mortgage to appellants. The deed provided that it was "subject to mortgage of $950.00". On March 23,1922, appellants executed a promissory note to Henry T.

Appeals No.11.

Appellate Court, Fourth District.

October Term, A.D.1926.

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Appellee.	)
	)
	) Appeal from
	) ST.CLAIR.
MARTHA C. T.RENSHAW,	)
[illegible] and HERESA LOUISE [illegible] and PETER WITTENAUER,	)
BERGMAN and THERESA LOUISE [illegible]	)
Appellants.	)

Opinion by Higbee, J.

---oOo---

This is an appeal by Henry Bergman and Theresa Louise Bergman from a decree of the circuit court of St.Clair county, rendered on a bill for foreclosure filed by Jennie Kerins, appellee.

It appears from the record that on October [illegible], 1918, James R.Pruitt and Martha G.Pruitt, his wife, executed a mortgage on certain [illegible]ses in the City of East St.Louis to Henry T.Renshaw, [illegible]ee, securing the payment of a promissory note for $950. This mortgage was recorded November 14, 1918 and shortly thereafter Renshaw sold the note and mortgage to appellee. No assignment of [illegible] was placed upon record, but Renshaw endorsed the note and delivered it together with the mortgage, to appellee who has since that time retained possession thereof. Until April 8, 1920, Renshaw collected the interest on this mortgage indebtedness, and paid the same to appellee. On March 28, 1919, the Pruitts by warranty deed conveyed the premises covered by this mortgage to appellants. [illegible] deed provided that it was "subject to mortgage of $950.00". On March 23, 1922, appellants executed a promissory note to Henry T.

Renshaw, trustee, for $1200, due three years after date and at the same time executed a mortgage on these same premises to secure this note to said Henry T. Renshaw, trustee, which was recorded on March 27, 1922. At the time this mortgage was executed Renshaw told appellants that he could not deliver them the old note and mortgage that is, the note and mortgage involved in this suit, until he had had the mortgage released and that after ~~that~~ it was released he would mail them both the note and mortgage. Appellants did not see the note or mortgage at that time and as a matter of fact Renshaw did not have them in his possession.

On March 27, 1922 Renshaw filed for record a release of appellee's mortgage dated March 28, 1922. Out of the $1200 provided for by appellants' note and mortgage, Renshaw paid them $270 in cash and retained the rest in purported payment of appellee's mortgage indebtedness, but no part of this was ever paid to appellee. It appears to be agreed by all parties that appellants' mortgage for $1200 given by them on March 23, 1922, is a prior lien to appellee's mortgage and the trial court having so held that question is not before this court. On April 14, 1922, Renshaw assigned said $1200 mortgage to Peter Wittenauer. It clearly appears from the proof that Renshaw's release of appellee's mortgage was made without her knowledge and was fraudulent. Appellants knew of appellee's mortgage and the deed to them from the Pruitts was made subject thereto. Appellant Henry Bergman testified that he was to pay the Pruitts $2000 for the property; that he paid $500 in cash, gave the Pruitts a note for $500 and was to pay the said $950 note. The payment of appellee's note was therefore to be a part of the purchase price paid by appellants for the premises. Appellee, or her son for her, has always had possession of the note and mortgage from the time of their execution. The proof does not show that appellants knew Renshaw was

Henshaw, trustee, for $1200, due three years after date and at the same time executed a mortgage on these same premises to secure this note to said Henry T. Henshaw, trustee, which was recorded on March 27, 1922. At the time this mortgage was executed Henshaw told appellants that he could not deliver them the old note and mortgage that is, the note and mortgage involved in this suit, until he had had the mortgage released and after that it was released he would mail them both the note and mortgage. Appellants did not see the note or mortgage at that time and as a matter of fact Henshaw did not have them in his possession.

On March 27, Henshaw filed for record a release of appellee's mortgage dated March 23, 1922. Out of the $1200 provided for by appellants' note and mortgage, Henshaw paid them $270 in cash and retained the rest in purported payment of appellee's mortgage indebtedness, but no part of this was ever paid to appellee. It appears to be agreed by all parties that appellants' mortgage for $1200 given by them on March 23, 1922, is a prior lien to appellee's mortgage and the trial court having so held that question is not before this court. On April 14, 1922, Henshaw assigned said $1200 mortgage to Peter Wittenauer. It clearly appears from the proof that Henshaw's release of appellee's mortgage was made without her knowledge and was fraudulent. Appellants knew of appellee's mortgage and the deed to them from the Fruitts was made subject thereto. Appellant Henry Bergman testified that he was to pay the Fruitts $2000 for the property; that he paid $500 in cash, gave the Fruitts a note for $500 and was to pay the said $1000 note. The payment of appellee's note was therefore to be a part of the purchase price paid by appellants for the premises. Appellee, or her son for her, has always had possession of the note and mortgage from the time of their execution. The proof does not show that appellants knew Henshaw was

the agent for appellee or that they relied on that fact in the transactions connected with the execution of their mortgage.

The fact that Renshaw was made trustee in the mortgage gave him of itself no right or ~~the~~ authority to receive payment of the debt secured thereby (Leon v.McIntyre,88 Ill.App.349). If the trustee releases a trust deed and receives payment of the debt without actual authority and without producing the securities the party paying has notice of the want of power in the trustee. The inference of authority to receive payment of the securities is founded upon the poeesssion thereof and it does not exist without possession. (Fortune v.Stockton,182 Ill.454; Stiger v. Bent,111 Ill.328; Keohane v.Smith,97 Ill.156; King v.Harpster, 306 Ill.202.)

Appellants having made payment of appellee's mortgage to the trustee,Renshaw,when he was not authorized to receive the same and having taken from him a release without obtaining the note secured by said mortgage, ~~is~~ are chargeable with notice of Renshaw's want of power to receive payment thereof and release the mortgage. In accordance with the law as said down in the above authorities and the facts shown by the proof in this case,the decree herein must be affirmed.

Decree Affirmed.

Not to be reported

the agent for appellee or that they relied on that fact in the transactions connected with the execution of their mortgage.

The fact that Renshaw was made trustee in the mortgage gave him of itself no right or ~~the~~ authority to receive payment of the debt secured thereby (Leon v.Bankmore,88 Ill .App.349).

If the trustee releases a trust deed and receives payment of the debt without actual authority and without producing the securities the party paying has notice of the want of power in the trustee. The inference of authority to receive payment of the securities is founded upon the possession thereof and it does not exist without possession. (Fortune v.Stockton,182 Ill.464; Stiger v. Bent,111 Ill.328; Keohane v.Smith,97 Ill.156; King v.Harpster, 106 Ill.202.)

Appellants having made payment of appellee's mortgage to the trustee,Renshaw,when he was not authorized to receive the same and having taken from him a release without obtaining the note secured by said mortgage,~~he~~ chargeable with notice of Renshaw's want of power to receive payment thereof and release the mortgage. In accordance with the law as laid down in the above authorities and the facts shown by the proof in this case,the decree herein must be affirmed.

Decree Affirmed.

Term No. 61. Appellate Court Agenda No. 5.

Fourth District

March Term, A. D. 1926.

See Next opinion

John P. Keim, Appellee	)	Appeal from Circuit Court
vs.	)	of
Henry T. Renshaw, et. al., Margaret Miller and John Monynihan, Appellants.	)	St. Clair ~~County.~~

OPINION BY HIGBEE, J.

On October 17, 1922, John P. Keim, filed his bill to the January term, 1923, of the circuit court of St. Clair County to foreclose a certain mortgage making Henry T. Renshaw, Nettie P. Renshaw, Willis O. Mayo, Sarah Mayo, Margaret Miller, John Monynihan, Alex S. Vien, M. P. Murray, Jr., and N. C. McLain, parties defendant. The bill alleges that on April 16, 1911, Willis O. Mayo and Sarah Mayo executed and delivered to Henry T. Renshaw, trustee, their promissory note in the sum of $1000 and to secure the payment of the same executed the mortgage sought to be foreclosed, which was duly recorded on the 27th day of April, 1911; that shortly after the execution of the said note and mortgage appellee became the owner thereof, and has continued in possession of the same up to the time of the filing of the bill.

The bill also alleges that Margaret Miller purchased the premises involved on the 12th day of June, 1919, at which time appellee's mortgage was of record, and that she had due notice of the same; that on April 25, 1922 Henry T. Renshaw, trustee, fraudulently released the mortgage involved, and that one John Moynihan claimed to have some interest in the premises as mortgagee; that the other defendants named claimed some interest in the premises involved as receivers or otherwise but that the interests of all these defendants were inferior and subject to the rights of appellee.

Margaret Miller filed an answer neither admitting nor denying that the Mayos were indebted to Henry T. Renshaw, trustee, in the sum of $1000, but admitting that such a mortgage as the one mentioned in the bill appears

No. 11. Appellate Court. C. Agenda No. 5.

Fourth District

March Term, A. D. 1926.

APPEAL FROM CIRCUIT COURT

OF

ST. CLAIR COUNTY.

OPINION BY MCGRATH, J.

On October 17, 1922, John P. Keim, filed his bill to the [illegible] term, 1922, of the circuit court of St. Clair County to foreclose [illegible] mortgage making Henry T. Henshaw, Nettie P. Henshaw, Willis O. [illegible], Sarah Mayo, Margaret Miller, John Morgenthau, Alex S. Vlem, [illegible], Jr., and W. C. Mohlin, parties defendant. The bill alleges [illegible] 16, 1921, Willis O. Mayo and Sarah Mayo executed and delivered [illegible] Henshaw, trustee, their promissory note in the sum of $1000 and [illegible] the payment of the same [illegible] ed, which was duly recorded on the 27th of April, 1921, that shortly [illegible] the execution of the said note and mortgage appellee became the [illegible] thereof, and has continued in possession of the same up to the time [illegible] filing of the bill.

The bill also alleges that Margaret Miller purchased the premises [illegible] on the 15th day of June, 1919, at which time appellee's mortgage [illegible] record, and that she had due notice of the same; that on April 15, [illegible] Henry T. Henshaw, trustee, [illegible] that the date appearing upon it was [illegible] that the other attachments [illegible] were inferior and subject to the rights of appellee.

Margaret Miller filed an answer neither admitting nor denying that [illegible] were indebted to Henry T. Henshaw, trustee in the sum of $1000, [illegible] that such a mortgage as the one mentioned in the bill appears

f record, and alleging that whatever indebtedness it was given to secure had been fully paid; that the mortgage had been released on the record by Henry T. Renshaw, trustee, and that the same was not a lien on the premises described. This answer further alleged that on June 12, 1919, Henry T. Renshaw executed to Margaret Miller a bond for a deed for which she paid him $900, conditioned that when this amount was paid said Renshaw was to execute her a warranty deed, and she was to assume a mortgage of $1000; that the last of these payments had been made, but that said deed was never executed, and that the bond for a deed given herby Renshaw was recorded on the 29th day of August, 1922; that she went into possession of the property upon the execution of the bond for a deed, and had continued in possession thereof ever since; that she, the said Margaret Miller, was entitled to a deed to said premises from the said Henry T. Renshaw.

John Moynihan filed an answer containing the same statements concerning the execution of the note and mortgage in question, and further alleging that on the 21st day of April 1922, Henry T. Renshaw and his wife executed their note in the sum of $1000 to John W. Renshaw and also executed a mortgage securing the payment of the same on the same property described in appellee's mortgage; that said mortgage was duly recorded on the 21st day of April, 1922; that he, on some date not set forth, purchased and became the owner of this mortgage, and at the time of his purchase of the same said John W. Renshaw produced a certificate of title issued by the St. Clair Title and Guaranty Company showing that the fee simple title to the property involved was fully vested in Henry T. Renshaw and Nettie P. Renshaw his wife and that an examination of the record then showed that the mortgage held by appellant had been released; that the mortgage held by said John Moynihan was superior to the mortgage owned by appellee and to any interest of Margaret Miller in or to said premises. Replications were filed to these answers, and the cause referred to the Master in Chancery. Upon the coming in of the report of the Master in Chancery the court after overruling the exceptions thereto, entered a decree finding that on April 15, 1911, the Mayos executed the note and mortgage sought to be foreclosed by appellee, and that shortly thereafter appellee became the owner

of the same; that said Henry T. Renshaw continued to pay the interest to appellee up until April 5, 1922; that in August, 1922 the firm of which said Henry T. Renshaw was a member failed and was later adjudicated a bankrupt; that on September 12, 1919, the Mayos conveyed the property involved to said Henry T. Renshaw, but made no mention of the mortgage involved, in their deed; that prior thereto, on to-wit, June 12, 1919, appellant, Margaret Miller made a contract or bond for a deed with Renshaw for the purchase of the premises herein involved subject to a thousand dollar mortgage, payment of which was assumed by her; that appellant Miller thereupon went into possession of said premises, and continued in the possession of the same to the time of the filing of the bill herein; that on April 21, 1922, said Henry T. Renshaw, as trustee, fraudulently and without authority from appellee executed a release deed, releasing appellee's mortgage, but that said release was not filed for record until April 25, 1922; that on April 21, 1922, said Henry T. Renshaw and his wife, executed the mortgage owned by appellant Moynihan, which was filed for record on the same day that the release of appellee's mortgage was filed for record; that this note, dated April 21, 1922, was shortly after the execution thereof sold to appellee Moynihan;

that there is some doubt as to the date when Moynihan purchased the loan; that he filed an affidavit of record after the Renshaw failure, stating that he acquired it April 21, 1922, several days prior to the recording of the release of appellee's mortgage, but that in this case he testified he purchased the same on April 24, one day prior to the recording of the release deed.

The decree, then, after referring to some finding in proceedings in the bankruptcy of the Renshaw firm concerning which no questions are raised on this appeal, finds that at the time of the purchase of these premises by appellant, Margaret Miller, under her bond for deed, appellee's mortgage was of record, and she was charged with notice thereof; that the release deed executed by Henry T. Renshaw on April 21, 1922, of appellee's mortgage was null and void, and the same was ordered and decreed to be set aside,

[illegible] to pay the interest to [illegible] April 8, 1922; that in August, 1922 the firm of which [illegible] T. Renshaw was a member failed and was later adjudicated a [illegible]; that on September 12, 1919, the Hayes conveyed the property [illegible] T. Renshaw, but made no mention of the mortgage [illegible]; that prior thereto, on to-wit, June 14, 1919, [illegible] contract or bond for a deed with Ben [illegible] the premises mentioned involved subject to a the second [illegible] of which was assumed by her; that appellant [illegible] possession of said premises, and continued in [illegible] to the time of the filing of the bill herein; [illegible] Henry T. Renshaw, as trustee, fraudulently [illegible] release deed, releasing [illegible] not filed for record until [illegible] 1922, said Henry T. Renshaw and his wife, [illegible] which was filed for [illegible] mortgage was filed [illegible] April 21, 1922, was shortly after the [illegible] said to appellee Moynihan;

[illegible] is some doubt as to the date when Moynihan purchased [illegible] filed an affidavit of record after the Renshaw failure, [illegible] April 21, 1922, several days prior to the [illegible] of the release of appellee's mortgage, but that in this case he [illegible] 24, one day prior to the record- [illegible]

Then, after referring to some pleading in proceedings [illegible] the Renshaw firm concerning which no questions are [illegible] made that at the time of the purchase of these [illegible] Margaret Miller, under her bond for deed, appellee's [illegible] and she was charged with notice thereof; that the [illegible] T. Renshaw on April 21, 1922 of appellee's [illegible]

It was further decreed that the mortgage owned by appellant John Moynihan and afterwards assigned to Ralph Cook, which assignment was not of record, was null and void as against the rights of appellee and appellant Margaret Miller, and appellee's prayer for the foreclosure of his mortgage was allowed. From this decree the defendants Margaret Miller and John Moynihan alone appealed.

The evidence shows conclusively that appellee's mortgage had not been paid and that the release of this mortgage by Henry T. Renshaw trustee was fraudulent and without authority from appellee; that at the time Henry T. Renshaw gave Margaret Miller the bond for a deed appellee's mortgage was of record and she assumed the payment of the same; that at the time appellant John Moynihan purchased his mortgage, appellee's mortgage had not been released of record. Under these circumstances it is clear that appellee had not in any way lost his right to foreclose his mortgage. The only question involved on this appeal is appellee's right to a foreclosure of his mortgage and as the proofs fully sustain the findings of the chancellor and the decree entered in accordance therewith, such decree should be and is hereby affirmed.

DECREE AFFIRMED.

Not to be reported

It was further decreed that the mortgage owned by appellant [illegible] and afterwards assigned to Ralph Cook, which assignment was [illegible] record, was null and void as against the rights of appellee and [illegible] Miller, and appellee's prayer for the foreclosure of [illegible] was allowed. From this decree the defendants Margaret Miller [illegible] John Moynihan alone appealed.

The evidence shows conclusively that appellee's mortgage had not [illegible] and that the release of this mortgage by Henry T. Kenshaw was [illegible] fraudulent and without authority from appellee; that at the time [illegible] T. Kenshaw gave Margaret Miller the bond for a deed appellee's [illegible] was of record and she assumed the payment of the same; that at [illegible] time appellant John Moynihan purchased his mortgage, appellee's [illegible] had not been released of record. Under these circumstances it is [illegible] that appellee had not in any way lost his right to foreclose his [illegible] The only question involved on this appeal is appellee's right [illegible] a foreclosure of his mortgage and as the proofs fully sustain the find- [illegible] of the chancellor and the decree entered in accordance therewith, [illegible] decree should be and is hereby affirmed.

[illegible] MCGRAW, JUSTICE.

STATE OF ILLINOIS.
APPELLATE COURT
FOURTH DISTRICT.

OCTOBER TERM, A. D. 1926.

Term No. 61. Agenda No. 5.

Refiled Opinion

See Previous opinion

4A

JOHN P. KEIM, Appellee.	)	Appeal from the Circuit Court of St. Clair County.
VS.	)	
HENRY T. RENSHAW, et. al. MARGARET MILLER and JOHN MONYNIHAN, Appellants.	)	

Higbee, J. - On October 17, 1922, John P.Keim, filed his bill to the January term, 1923, of the circuit court of St. Clair county to foreclose a certain mortgage making Henry T. Renshaw Nettie P. Renshaw, Willis O. Mayo, Sarah Mayo, Margaret Miller, John Moynihan, Alex. S. Vein, M. P.Murray, Jr., and N. C. Mc Lain parties defendant. The bill alleges that on April 16, 1911, Willis O. Mayo and Sarah Mayo executed and delivered to Henry T. Renshaw, trustee, their promissory note in the sum of $1000. and to secure the payment of the same executed the mortgage sougth to be foreclosed, which was duly recorded on the 27th day of April, 1911; that shortly after the execution of the said note and mortgage appellee became the owner thereof, and has continued in possession of the same up to the time of the filing of the bill.

The bill also alleges that Margaret Miller purchased the premises involved on the 12th day of June, 1919, at which time the appellee's mortgage was of record, and that

she had due notice of the same; that on April 25, 1922, Henry T. Renshaw, trustee, fraudulently released the mortgage involved, and that one John Moynihan claimed to have some interest in the premises as mortgagee; that the other defendants named claimed some interest in the premises involved as receivers or otherwise but that the interests of all these defendants were inferior and subject to the rights of appellee.

Margaret Miller filed an answer neither admitting nor denying that the Mayos were indebted to Henry T. Renshaw, trustee, in the sum of $1000., but admitting that such a mortgage as the one mentioned in the bill appears of record, and alleging that whatever indebtedness it was given to secure had been fully paid; that the mortgage had been released on the record by Henry T. Renshaw, trustee, and that the same was not a lien on the premises described. This answer further alleges that on June 12, 1919, Henry T. Renshaw executed to Margaret Miller a bond for a deed for which she paid him $900., conditioned that when this amount was paid said Renshaw was to execute her a warranty deed, and she was to assume a mortgage of $1000; the last of these payments had been made, but that the said deed was never executed, and that the bond for a deed given her by Renshaw was recorded on the 29th day of August, 1922; that she went into possession of the property upon the execution of the bond for a deed, and had continued in possession thereof ever since; that she the said Margaret Miller was entitled to a deed to said premises from the said Henry T. Renshaw.

John Moynihan filed an answer containing the same statements concerning the execution of the note and mortgage in question, and further alleging that on the 21st day of April, 1922, Henry T. Renshaw and his wife executed their note in the sum of $1000. to John J. Renshaw and also executed

a mortgage securing the payment of the same on the same property described in appellee's mortgage; that said mortgage was duly recorded on the 21st day of April, 1922; that he, on some date not set forth, purchased and became the owner of this mortgage, and at the time of his purchase of the same the said John W. Renshaw produced a certificate of title issued by the St. Clair Title and Guaranty Company showing that the fee simple title to the property involved was fully vested in Henry T. Renshaw and Nettie P. Renshaw his wife and that an examination of the record then showed that the mortgage held by appellant had been released; that the mortgage held by said John Moynihan was superior to the mortgage owned by appellee and to any interest of Margaret Miller in or to said premises. Replications were filed to these answers, and the cause referred to the Master in Chsncery, Upon the coming in of the report of the Master in Chancery the court after overruling the exceptions thereto, entered a decree finding that on April 15, 1911, the Mayos executed the note and mortgage sought to be foreclosed by appellee, and that shortly thereafter appellee became the owner of the same; that said Henry T. Renshaw continued to pay the interest to appelle up until April 5, 1922; that in August, 1922, the firm of which said Henry T. Renshaw was a member failed and was later adjudicated a bankrupt; that on September 12, 1919, the Mayos conveyed the property involved to Henry T. Renshaw, but made no mention of the mortgage involved, in their deed; that prior thereto, on to-wit, June 12, 1919, appellant, Margaret Miller made a contract or bond for a deed with Renshaw for the purchase of the premises herein involved subject to a thousand dollar mortgage, payment of which was assumed by her; that appellant Miller thereupon went into possession of said premisoy, and continued in the possession of the same to the time of the filing of the

bill herein; that on April 21, 1922, said Henry T. Renshaw, as trustee, fraudulently and without authority from appellee executed a release deed, releasing appellee's mortgage, but that said release was not filed for record until April 25, 1922; that on April 21, 1922, said Henry T. Renshaw and his wife, executed the mortgage owned by appellant Moynihan, which was filed for record on the same daythat the release of appellee's mortgage was filed for record; that this note, dated April 21, 1922, was shortly after the execution thereof sold to appellee Moynihan; that there is some doubt as to the date when Moynihan purchased the loan; that he filed an affidavit of record after the Renshaw failure, stating that he acquired it April 21, 1922, several days prior to the recording of the release of appellee's mortgage, but that in this case he testified he purchased the same on April 24, one day prior to the recording of the release deed.

The decree, then, after referring to some finding in proceedings in the bankruptcy of the Renshaw firm concerning which no questions are raised on this appeal, finds that at the time of the purchase of these premises by appellant, Margaret Miller, under her bond for deed, appellee's mortgage was of record, and she was charged with notice thereof; that the release deed executed by Henry T. Renshaw on April 21, 1922, of appellee's mortgage, was null and void and the same was ordered and decreed to be set aside.

It was further decreed that the mortgage owned by appellant John Moynihan and afterwards assigned to Ralph Cook, wihch assigment was not of record, was null and void as against the rights of appellee and appellant Margaret Miller, and appellee's prayer for the foreclosure of his mortgage was allowed. From this decree the defendants Margaret Miller and John Moynihan alone appealed.

The evidence shows conclusively that appellee's mortgage had not been paid and that the release of this mortgage by Henry T. Renshaw trustee was fraudulent and without authority from appellee; that at the time Henry T. Renshaw gave Margaret Miller the bond for a deed appellee's mortgage was of record and she assumed the payment of the same. It also appears to us to be shown by the proof that at the time appellant John Monihan purchased his mortgage, appellee's mortgage had not been released of record. Under these circumstances it is clear that appellee had not in any way lost his right to foreclose his mortgage. The proofs fully sustain the findings of the chancellor and the decree entered in accordance therewith, and therefore such decree should be and is hereby affirmed.

DECREE AFFIRMED.

Not to be reported.

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STATE OF ILLINOIS.

APPELLATE COURT

4TH. DISTRICT.

OCTOBER TERM, A. D. 1926.

TERM NO. 3. AG. NO. 19.

HENRY WARDEIN, et al, Appellants,	:	APPEAL FROM
VS.	:	ALTON CITY
EUPHRASIA D. QUINTAL, Appellee.	:	COURT.

PER CURIAM - RULE 15 of this Court, provides that the assignment of errors and cross-errors must be written upon or attached to the record. In the case at bar no assignment of errors has been written upon or attached to the record.

The requirement that upon appeal or writ of error there must be an assignment of errors written upon or attached to the record, is not a mere matter of form, to be considered waived if not objected to, but one of substance. The assignment of errors performs the same office in this court that a declaration does in a court of original jurisdiction, and is equally essential in the forming of an issue upon which the court can properly give judgment, Ditch vs. Sennott, 116 Ill. 288; Aetna Life Insurance Co., vs. Sanford, 197 Ill. 310.

It is not sufficient that the abstract of the record shows an assignment of errors which is not written upon or attached to the record, Ditch vs. Sennott, supra; Benneson vs. Savage, 119

STATE OF ILLINOIS,

APPELLATE COURT

4TH. DISTRICT.

OCTOBER TERM, A. D. 1920.

AG. NO. 10.

[illegible], Appellee,	:	APPEAL FROM
vs.	:	AUTOM CITY
[illegible], Appellee.	:	COURT.

PER CURIAM - RULE 15 of this Court, provides that the said assignments of errors and cross-errors must be written upon or attached to the record. In the case at bar no assignment of errors has been written upon or attached to the record.

The requirement that upon appeal or writ of error there must be an assignment of errors written upon or attached to the record, is not a mere matter of form, to be considered waived if not objected to, but one of substance. The said assignment of errors performs the same office in this court that a declaration does in a court of original jurisdiction, and is equally essential in the forming of an issue upon which the court can properly give judgment. Ditch vs. Bennett, 116 Ill. 288; Aetna Life Insurance Co., vs. Sanford, 197 Ill. 310.

It is not sufficient that the abstract of the record shows an assignment of errors which is not written upon or attached to the record. Ditch vs. Bennett, supra; Bennemon vs. Savage, 120

Ill. 135; McIntyre Life Insurance Co., vs. People, 205 Ill. 370. No errors having been assigned on the record, there is and can be no joinder in error, and therefore no issue for this court to try, Benneson vs. Savage, supra.

The cause having been submitted for final determination it is too late now for appellant to obtain leave to assign errors upon the record or for the court to require it to do so, Ditch vs. Sennott, supra; Benneson vs. Savage, supra. The failure to assign errors on the record necessitates a dismissal of the appeal even though alleged errors are argued in the briefs, Voges vs. Davison, 306 Ill. 357.

This court has frequently called attention to the fact that it is essential that the assignment of errors must be written upon or attached to the record and unless it is there is nothing for this court to consider, Maroni vs. Paitson, 128 App. 205; Haagen vs. Blobe Printing Co., 128 App. 307. It is unnecessary to cite other cases. The appeal is dismissed at the appellants' costs.

APPEAL DISMISSED.

Not to be reported

Ill. 120; McIntyre Life Insurance Co., vs. People, 208 Ill. 270. No errors having been assigned on the record, there is and can be no joinder in error, and therefore no issue for this court to try.

The cause having been submitted for final determination it is too late now for appellant to obtain leave to assign errors upon the record or for the court to require it to do so. Dietz vs. Bennett, supra; Jennison vs. Savage, supra. The failure to assign errors on the record necessitates a dismissal of the appeal even though alleged errors are argued in the briefs. Vogen vs. Davison, 306 Ill. 387.

This court has frequently called attention to the fact that it is essential that the assignment of errors must be written upon or attached to the record and unless it is there is nothing for this court to consider. Ian and vs. Pattson, 120 App. 208; Haegen vs. Globe Printing Co., 120 App. 307. It is unnecessary to cite other cases. The appeal is dismissed at the appellants' costs.

STATE OF ILLINOIS.

APPELLATE COURT

4TH. DISTRICT.

OCTOBER TERM, A.D. 1926.

TERM NO. 44. AG. NO. 34.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee,	:	APPEAL FROM
VS.	:	COUNTY COURT OF BOND COUNTY.
GEORGE STANBERY, Appellant.	:	

Per Curiam: - The transcript of the record in this case shows that appellant procured a special bill of exceptions pertaining to certain remarks made by counsel for appellee during the trial. It further shows that the general bill of exceptions bears the following endorsement:- "Presented this 30th day of September, A. D. 1926, Silas Cook, Trial Judge." There is no showing that the general bill of exceptions was ever settled and signed by Judge Cook. All of the alleged errors argued by appellant are such as can be preserved, only, by a bill of exceptions.

The abstract of the record contains no assignment of errors. It is well settled that the assignment of errors should be shown in the abstract, which should present whatever a reviewing court is asked to examine, and for a failure in that regard the judgment may be affirmed, Superior Lumber Co. vs. Tracy, 78 App. 551; Independent Electric Co., vs. Donald, 86 App. 106; Marsh vs. Jones, 106 App. 577; Brown vs. Otrich 119 App. 136.

All that the abstract of the common law record shows with reference to what was the verdict of the jury and the judgment of the court is as follows: "Pages 6 and 7 of record. Minutes of trial, judgment, verdict of jury, motion for new trial, judgment, judgment, motion for appeal." In the abstract of the purported bill of exceptions pertaining to the same matters, the following appears: - "Pages 213-214 of record. Verdict of the jury. Pages 214-217 of record. Motion of defendant for a new trial. Pages 218-219 of record. Ruling of the Court denying a new trial, allowing appeal and bill of exceptions, etc. Pages 219-244 of record. Final judgment of the Court." The abstract does not show what time was allowed for filing the appeal bond, or that a bond was ever filed or approved.

It has been held that an abstract of the record and a judgment which merely refers to the judgment as "judgment," "judgment on finding" or "thereupon the Court rendered judgment upon the verdict" does not furnish material upon which to base grounds for the reversal of the judgment, Amundsen Printing Co. vs. Empire Paper Co., 83 App. 440; Gilbert vs. Sprague, 88 App. 508; Marsh vs. Jones, 106 App. 577.

Four juries have passed upon this case and it is now here for the third time. We would be fully warranted in affirming the judgment, solely, because of the insufficiency of the abstract to present the alleged errors relied upon for a reversal. It may be that the clerk of the County Court simply neglected to show that the general bill of exceptions was signed by the Trial Court. Notwithstanding the insufficiency of the record and the abstract we have considered the various contentions urged by appellant.

We are of the opinion that the Court would not be warranted in holding that the verdict is so manifestly against the weight of the evidence that it should not be permitted to stand. It may be that the Court erred in some of its rulings on

All that the abstract of the common law record shows with reference to what was the verdict of the jury and the judgment of the court is as follows: "Pages 6 and 7 of record. Minutes of trial, judgment, verdict of jury, motion for new trial, judgment, motion for appeal." In the abstract of the proposed bill of exceptions pertaining to the same matters, the following appears: - "Pages 212-214 of record, Verdict of the jury. Pages 214-217 of record. Motion of defendant for a new trial. Pages 218-219 of record. Ruling of the Court denying a new trial, allowing appeal and bill of exceptions, etc. Pages 219-224 of record. Final judgment of the Court." The abstract does not show that time was allowed for filing the appeal bond, or that a bond was ever filed or approved.

It has been held that an abstract of the record and a judgment which merely refers to the judgment as "judgment," "judgment on finding" or "thereupon the Court rendered judgment upon the verdict" does not furnish material upon which to base a motion for the reversal of the judgment, annulling or vacating. Mapine Paper Co., 82 App. 440; Hilbert vs. Spangler, 80 App. 209; Harris vs. Jones, 106 App. 277.

Four Juries have passed upon this case and it is now here for the third time. We would be fully warranted in affirming the judgment, solely, because of the insufficiency of the abstract to present the all-sufficient answer relied upon for a reversal. It may be that the clerk of the County Court simply neglected to show that the general bill of exceptions was signed by the Trial Court. Notwithstanding the insufficiency of the record and the abstract we have considered the various contentions urged by appellant.

We are of the opinion that the Court would not be warranted in holding that the verdict is so manifestly against the weight of the evidence that it should not be permitted to stand. It may be that the Court erred in some of its rulings on

the admission and exclusion of evidence, but we are of the opinion that any errors committed in that regard were not so grave as to require a reversal.

Six instructions were given on behalf of appellee and fifteen on behalf of appellant. Some of the criticisms directed against the instructions given for appellee would apply with equal force to some that were given for appellant. Instructions were given on behalf of appellant which were more favorable than the law would warrant. Taking the instructions as a series we are of the opinion that the inaccuracies in those given on behalf of appellee were not such as were likely to mislead the jury as to the main issue in the case.

Appellant argues that one of the attorneys for appellee made prejudicial remarks to the jury. One of the remarks complained of was made in the opening statement of the case and was to the effect that appellee would offer certain evidence. The special bill of exceptions shows that appellant objected to the remarks and the objection was sustained by the Court. It also shows that there was no objection made to the other remarks. Appellant has no ground upon which to base a complaint in regard to the remarks of counsel. No reversible error having been pointed out and the abstract being insufficient to present the alleged errors, the judgment is affirmed.

Not to be reported AFFIRMED.

the admission and exclusion of evidence, but we are of the opinion that any errors committed in that regard were not so grave as to require a reversal.

Six instructions were given on behalf of appellee and fifteen on behalf of appellant. Some of the criticisms directed against the instructions given for appellee would apply with equal force to some that were given for appellant. Instructions were given on behalf of appellant which were more favorable than the law would warrant. Taking the instructions as a series we are of the opinion that the inaccuracies in those given on behalf of appellee were not such as were likely to mislead the jury as to the main issue in the case.

Finally, it is argued that one of the attorneys for appellee made prejudicial remarks to the jury. One of the remarks complained of was made in the opening statement of the case and was to the effect that appellee would offer certain evidence. The special bill of exceptions shows that appellant objected to the remark and the objection was sustained by the Court. It also shows that there was no objection made to the other remarks. Appellant has no ground upon which to base a complaint in regard to the remarks of counsel. No reversible error having been pointed out and the abstract being insufficient to present the alleged errors, the judgment is affirmed.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

MARCH TERM, A. D. 1927.

TERM NO. 1. AGENDA NO. 1.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	:	ERROR TO COUNTY COURT
VS.	:	OF MARION COUNTY.
JAMES OGG, Plaintiff in Error.	:	

BARRY, P. J. -- In August 1924 an information was filed against plaintiff in error charging him with a violation of the Prohibition Act. At the March Term 1925 he filed a petition asking that the search warrant be quashed and the property seized to be returned to the owner. He also moved the Court to quash the information. At the November Term 1925 he was tried and convicted and a motion for a new trial having been overruled he was fined $500.00 and costs and sentenced to the county jail for sixty days.

It is argued that the Court erred in overruling the motion to quash the information. If the Court made such a ruling it is not shown in the abstract of the record. It is argued that the Court erred in striking the petition to quash the search warrant, etc., from the files. The abstract fails to show that the Court made such an order or that any exception was taken. The abstract does show that the petition aforesaid was not preserved in the bill of exceptions. A motion or petition of this character, as well as the ruling of the Court thereon, must be preserved in a bill of exceptions, People vs. Levin, 318 Ill. 227. If the Court struck the petition from the files at the March Term 1925 it would have been necessary for plaintiff

in error to procure a bill of exceptions in reference to that matter at that term of court, or within such time as the Court might then allow for the filing of the same, Bunyan vs. American Glycerin Co., 230 App. 351; Wabash St. L. & P. Ry. Co. vs. People, 106 Ill. 652.

The abstract must be sufficient to present every error relied upon as the Court will not search the record to find errors not disclosed by the abstract, People vs. Paul, 167 App. 557; People vs. Yuskauskas, 268 Ill. 228; People vs. Armour, 307 Ill. 234.

It is argued that the Court erred in admitting in evidence a portion of the "mash" which was seized by the officer for the reason that there was no valid search warrant. That point was made upon the trial of the case before the jury and after plaintiff in error had filed his petition to quash the search warrant, etc. In his petition he did not claim that the mash was his property or that the same had been taken from his possession or his premises. His petition shows that he was claiming that an illegal search of the premises of other persons had been made and that by reason of such a search the evidence in question had been secured; that the property so secured was the property of other persons. On the trial of the case he was still making the same contentions and we are satisfied that the Court did not err in admitting the exhibits in evidence.

It is argued that the Court erred in permitting the State's Attorney to ask leading and suggestive questions. While the abstract shows that counsel for plaintiff in error objected to certain questions asked by the State's Attorney, yet it does not disclose any objection on the ground that the questions were leading or suggestive. Some complaint is made of the remarks of the State's Attorney in his argument before the jury. The record shows that the objection to such remarks were sustained by the court. The error assigned in that regard is that the --

verdict of the jury is the result of prejudice and passion engendered in the minds of the jury by the improper and prejudicial argument of the State's Attorney. The Court having sustained the objections and there being nothing to indicate that the verdict is the result of prejudice and passion by reason of the remarks we would not be warranted in holding such remarks to be reversible error.

It is argued that the Court gave improper instructions on behalf of the prosecution. We have carefully considered the instructions and the objections raised and while some of the instructions might have been put in better form, yet we are of the opinion that none of them were misleading, especially in view of the instructions given on behalf of plaintiff in error.

It is argued that the verdict is contrary to the law and the evidence. If the evidence offered on behalf of the People was true the jury was fully warranted in finding that the defendant had been proven guilty beyond all reasonable doubt. In the state of the proof we cannot say that the verdict of the jury is contrary to the law and the evidence. Finding no reversible error in the record, the judgment is affirmed.

AFFIRMED.

Not to be reported.

3/28a

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

MARCH TERM, A. D. 1927.

TERM NO. 7. AGEND. NO. 2.

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	:	ERROR TO THE COUNTY COURT
vs.	:	OF SALINE COUNTY.
DICK NORMAN, Plaintiff in Error.	:	

BARRY, P. J. -- Plaintiff in error was charged in an information with a violation of the Prohibition Law. Upon arraignment and after being duly warned, he entered a plea of guilty and was sentenced to the Illinois State Farm. A few days later he filed a written motion supported by his affidavit for leave to withdraw his plea, to set aside the judgment and for a new trial.

He contends that the Court erred in overruling his said motion. The abstract of the record shows that a bill of exceptions was signed by the trial court but it fails to show that the Court ruled on the motion or that plaintiff in error excepted to the overruling of the same.

A motion of this kind, and the Court's ruling thereon, are not parts of the Common Law Record. To become such they must be incorporated in a bill of exceptions, People vs. Levin, 318 Ill. 227. The abstract of the record must be sufficient to present every error relied upon as the Court will not search the record to find errors not disclosed by the abstract, People vs. Armour, 307 Ill. 234.

[illegible]

[illegible] NOV. [illegible], 1907.

[illegible] NO. 8.

OF THE STATE OF ILLINOIS, Defendant in Error,	ERROR TO THE COUNTY COURT
VS.	OF SALINE COUNTY.
Plaintiff in Error.	

MAHON, P. J. -- Plaintiff in error was charged in an information with a violation of the Prohibition law. Upon arraignment and after being duly warned, he entered a plea of guilty and was sentenced to the Illinois State Farm. A few days later he filed a written motion supported by his affidavit for leave to withdraw his plea, to set aside the judgment and for a new trial.

He contends that the Court erred in overruling his said motion. The abstract of the record shows that a bill of exceptions was signed by the trial court but it fails to show that plaintiff in error ex-

A motion of this kind and the Courts ruling are not parts of the Common Law Record. To become such be incorporated in a bill of exceptions, People - vs. [illegible]. The abstract of the record must be sufficient [illegible] every error relied upon as the Court will not search [illegible] abstract People

If the Court overruled the motion and there was an extension to the ruling, plaintiff in error has failed to preserve the same, and there is nothing for us to consider in that regard. It is argued that the information was not filed in the County Court. There is no basis for this contention except the mere fact that the clerk failed to endorse the date of the filing of the information and simply marked it "filed". The contention of plaintiff in error cannot be sustained. For the reasons aforesaid the judgment of the County Court is affirmed.

AFFIRMED.

Not to be reported.

STATE OF ILLINOIS

FOURTH DISTRICT

APPELLATE COURT

MARCH TERM, A. D. 1927.

TERM NO. 8. AGENDA NO. 7.

ELDORADO WHOLESALE CORPORATION, Appellee,	:	APPEAL FROM BOONE COUNTY CIRCUIT COURT.
vs.	:	
JOHN TERZIS, ET AL, Appellants.	:	

BARRY, P. J. -- Appellee sued appellants before a Justice of the Peace to recover for merchandise sold to the Busy Bee Cafe. There was an appeal to the Circuit Court and a trial without a jury. The court found the issues in favor of appellee and rendered judgment against appellants for $154.00.

It was stipulated on the trial that the goods in question were sold and delivered by appellee to the Busy Bee Cafe. The only question involved is whether appellant, John Terzis, is liable for the value thereof. Appellee's manager testified that he knew that Mr. Terzis was planning to start a Cafe; that he talked with him in regard to doing some business and that Mr. Terzis told him that Roy Margetes was going to run the Cafe; that he said to Terzis, "John, Roy's credit would not be any good to us;" that Mr. Terzis replied, "I own the cafe, the fixtures and the whole thing, and Roy is simply going to run it;" that he wanted Roy to think he was responsible for the goods; that he said to Mr. Terzis, "very well, your credit is good but Roy's is not" and that Terzis replied, "I will take care of that." He says that Mr. Terzis ordered some of the goods in question.

Mr. Quick, a salesman for appellee, says that before any of the goods were sold Mr. Terzis told him he was going to open a cafe and that Roy Margetes was going to run it for him. He says that he sold the first bill of goods to Terzis and Margetes amounting to about $100.00 and that the three of them were together on that occasion for an hour and a half; that Mr. Terzis took part in the ordering of the goods and overruled Mr. Margetes as to some things he wished to order. There was other evidence to the effect that Mr. Terzis was frequently in the cafe, that he often examined the ice-box and inspected the cash register.

While Mr. Terzis and Mr. Margetes testified that they were not partners and that Mr. Terzis was not interested in the business of the Busy Bee Cafe, yet, in the state of the proof, we would not be warranted in holding that there was not sufficient evidence to render Mr. Terzis liable under Section 16 of the Partnerships Act. The trial court was in a bet r position to judge the credibility of the witnesses than we are, and we cannot say that the conclusion of the court was manifestly against the weight of the evidence. No reversible error having been pointed out the judgment is affirmed.

AFFIRMED.

Not to be reported.

STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT.

MARCH TERM A. D. 1927.

TERM NO. 12. AGENDA NO. 3.

PAUL ALBRECHT,
Appellant,
vs.
COMPROMISE TOWNSHIP, et al.
Appellees

APPEAL FROM MADISON COUNTY
CIRCUIT COURT.

Barry, P. J.:- Appellant sued the township and Christ Bunte before a Justice of the Peace to recover damages alleged to have been occasioned to his horse, buggy and harness by reason of a bridge being out of repair. There was an appeal to the Circuit Court and that court directed a verdict in favor of appellees.

The law is well settled that townships are not liable to respond in damages for injuries resulting from roads and bridges allowed to become out of repair, Town of Waltham vs. Kemper, 55 Ill. 346; Bussell vs. Town of Steuben, 57 Ill. 35.

The record discloses that prior to the commencement of this suit appellant sued appellee Bunte to recover damages for personal injuries alleged to have been sustained as a result of the same accident and that the trial of that case resulted in a verdict and judgment in favor of Mr. Bunte. That being true there was an estoppel by verdict. There was no liability on the part of the township and an estoppel by verdict as to appellee Bunte. The Court, therefore, did not err in directing a verdict in favor of appellees. We might add that there was no evidence

offered, so far as the abstract shows, tending to prove the extent of the damages alleged to have been sustained. If Mr. Bunte were shown to be liable the jury would not have been warranted in allowing appellant more than nominal damages, in any event. The record fails to show that Mr. Bunte was Highway Commissioner or in any way responsible for the accident. Having failed to point any reversible error the judgment must be affirmed.

AFFIRMED.

not to be reported.

STATE OF ILLINOIS.
APPELLATE COURT,
FOURTH DISTRICT.

OCTOBER TERM A. D. 1926

TERM NO. 54 AGENDA NO. 57.

WILLIAM E. SCHNEIDER,
Appellee,

vs.

FORT DEARBORN CASUALTY UNDERWRITERS,
Appellant

APPEAL FROM CITY COURT
OF
EAST ST. LOUIS ILLINOIS.

Barry, P. J. Appellant insured appellee against any loss by reason of the liability imposed by law upon him for damages on account of bodily injuries, fatal or non-fatal, accidentally suffered, or alleged to have been suffered, by any person, or persons, by reason of the ownership, maintenance or use of a certain automobile.

The policy contained a provision to the effect that appellant should not be liable while the automobile was being operated in any manner prohibited by law. While the policy was in force, appellee, while driving his car, struck and injured Albert Scheik. Mr. Scheik sued appellee and thereupon he gave appellant notice thereof. Appellant employed counsel to defend appellee and the trial resulted in a verdict and judgment for $5,000.00.

Appellee sued to recover on the inusrance contract which he set out in his declaration with the usual averments. Appellant filed the general issue and four special pleas. The second special plea was to the effect that the policy sued on provides that appellant shall not be liable for injury occasioned while said automobile is being operated in any manner prohibited by law.

and that at the time of the alleged bodily injuries sustained by Albert Scheik, mentioned in the declaration, the automobile covered by said policy was being operated and driven by appellee in a manner prohibited by law; that is to say, at a speed greater than was then and there reasonable and proper, having regard to the traffic and the use of the way, and so as to endanger the life of limb or injure the property of another person, towit: at a rate of speed greater than twenty miles an hour on a public highway in a closely built up residence district within the limits of the City of East St. Louis, Illinois.

Appellee replied to the second special plea that appellant waived the provisions of the policy set forth in said plea, because immiedately following the injury to Mr. Scheik, he gave notice thereof to appellant and when sued by Mr. Scheik appellant employed attorneys and defended appellee in said suit, knowing all the facts and circumstances, etc. Appellant demurred to said replication and the same was overruled, and it then elected to stand by its demurrer. The trial resulted in a verdict and judgment in favor of appellee for $5,303.13.

Appellant contends that it is not liable and the Court should have directed a verdict in its favor because of the fact that appellee has never paid the judgment recovered against him by Mr. Scheik. This cannot be sustained. The obligation of appellant was to indemnify appellee against loss by reason of the liability imposed by law upon him for damages on account of bodily injuries, etc. When Mr. Scheik was injured the liability was incurred and when the Court enetered judgment against appellee the loss on account of said liability was sustained, Ravenswood Hospital vs. Casualty Co., 280 Ill. 403.

Appellant contends that the Court erred in overruling its demurrer to the replication to the second special plea.

While the record shows that appellant elected to stand by its said demurrer yet it also appears that upon the trial of the case appellant offered evidence as to the circumstances under which Mr. Scheik was injured and questioned its witnesses as to the rate of speed at which appellee was driving his car at the time of the injury. It also offered proof as to the injury having occured in a built-up residence portion of the City of East St. Louis. It submitted instructions to the effect that if appellee, at the time he injured Mr. Scheik, was driving his car at a speed greater than was then and there reasonable and proper, having regard to the traffic and the use of the way, etc., then, and in such case, the jury should find in favor of appellant. Several of such instructions were given at the request of appellant. Having been permitted to produce its evidence in support of its second special plea and the Court having instructed the jury at the request of appellant upon the theory that appellee had denied the averments of the said plea, appellant is in no position to contend that the Court erred in overruling its demurrer to the replication to its said plea.

But at any rate the second plea does not aver that the operation of the car by appellee in a manner prohibited by law was the cause of the injury to Mr. Scheik. Accident insurance policies usually contain provisions whereby the insurance is not to extend to injuries caused by, or while, or in consequence of, violating the law. In order to bring the injury or death within the terms of this exception there must be a clear violation of some criminal law; and no protection is afforded to the insurer by the fact that when injured or killed he was violating a civil right, a law or ordinance not cirminal in its nature, or a rule of morality. In order to relieve the insurer of liability the insured must have been actually engaged in a violation of the law at the time of the injury, and the injury must be shown to have resulted from the act

which is claimed to be unlawful or at least to have had a causative connection therewith, 1 Corpus Juris, 457.

In order to defeat a recovery under policies avoiding or limiting liability where death or injury results from the insured's criminal action, or in consequence of any violation of law, or from an unlawful act on his part, it is held that there must be some causative connection between the insurer's act and his death or injury, 17 A. L. R. 1005. Where a policy reduced the liability of the insurer in case the insured was injured while violating the law it was held to apply only when the injuries results from the causes named and not to limit liability where the insured was killed in a collosion between a motorcycle which he was riding and another motorcycle, though he had no procured a registration sertificate or license number as required by law, Fischer vs. Midland Causalty Co., 189 App. 486.

In a suit upon a policy, providing that no claim should be made for an injury which might happen "in consequence of voluntary exposure to unnecessary danger, or while engaged in, or in consequence of any criminal act," an answer that, at the time plaintiff was injured, he was in a public highway, in a state of intoxication, which is a criminal act under the statute, and, "that the injury happened to the plaintiff while he was engaged in, and in consequence of a criminal act," is bad on demurrer; the conclusion being a mere conclusion of law, and no causative connection being shown between the alleged criminal act and the injury, National Benifit Association, vs. Bowman, 11 N. E. (Ind) 316. It is immaterial whether the death of the insured resulted from a violation of a criminal law, or of a positive rule of civil law, provided the violation of law was such as increased the risk and naturally led to his death, Bloom, vs. Franklin Ins. Co., 97 Ind. 478.

We are of the opinion that in any event the plea was

bad because it failed to show any causative connection between the alleged violation of the law and the injury. If the replication was not a good one it was a sufficient answer to a bad plea, Gould's Pl. ch. 9, sec. 37; People vs. Central Telephone Co., 232 Ill. 260-276; Weatherford, vs. School Directors, 317 Ill. 495-500. Appellant cannot complain that the defective replication was allowed to stand to a defective plea, 1 Chitty's Pl., p. 668; L. N. A. & C. Ry. Co., vs. Carson, 169 Ill. 247-255. The replication and the plea being bad, they must fall together. Ill. Fire Ins. Co. vs. Stanton, 57 Ill. 354-358.

Then again, appellant insured appellee against any loss by reason of the liability imposed by law, etc. Another provision purports to relieve appellant from all liability if the injury occured while appellee was operating his car in any manner prohibited by law. These provisions are very inconsistent. If the policy in question is to be so construed as to relieve appellant from liability in all cases where the insured was operating his car in a manner prohibited by law, the insured would have no protection in most cases. Practically all automobile accidents are due to the fact that some law has been violated by one or both of the drivers. Where there are conflicting clauses in an insurance contract, the one which affords the most protection to the insured will control, Monahan vs. Fidelity Ins. Co., 242 Ill. 488. The policy in question is so framed as to be susceptible of one construction in the hands of the soliciting agent, and of quite a different one in the hands of the adjuster. It has been so held that policies should not be so framed, Travelers Ins. Co., vs. Dunlap, 160 Ill. 642-647.

Appellant contends that the Court erred in modifying two of its instructions by striking out the word "fifteen" where it appeared in said instructions, and inserting in lieu thereof,

the word, "twenty". The second special plea avers that appellee was operating his car at a rate of speed greater than twenty miles an hour, etc. The instructions in question were evidently based upon that plea as there was no other plea presenting that defense. The Court simply changed the instructions so as to correspond with the plea. Appellant is in no position to complain of that modification. No complaint is made of the Court's ruling on any of the other instructions. No reversible error having been shown the judgment is affirmed.

AFFIRMED.

Not to be reported.

5932

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1926.

TERM NO. 1. AGENDA NO. 32.

James F. Keeley and John Keeley, Partners, doing business as Keeley Brothers Contracting Company, Plaintiffs in Error,	:	Error to the Circuit Court of Madison County.
vs.	:	
Illinois Glass Company, Defendant in Error.	:	

HIGBEE, J.- Plaintiffs in error, hereinafter called plaintiffs, brought this suit to recover damages from defendant in error, hereinafter called defendant, for the alleged breach of a contract entered into by said parties on August 24, 1920, whereby plaintiffs undertook to construct certain buildings at Bridgetown, New Jersey, for defendant. The contract contained the following, among other provisions:

General Conditions.

3. The Contractor agrees to furnish all material and equipment and to perform all labor necessary to the excavation, erection and completion of all plain and reinforced concrete foundations, walls, columns, floors and machinery emplacements in the following buildings: Power House, North and South Producer, Houses, Batch Plant and Factory Building. All material and labor to conform exactly with the drawings mentioned herein and with these specifications.

Drawings.

4. Drawings of the various portions of the work will be furnished by the owner as the work progresses and accepted by the Contractor in writing, as a binding portion of this Contract. Any suggested changes of alterations therefrom must be submitted in duplicate form, as sketches or drawings, and must bear the approval signature of the Owner's authorized representative or agent.

A-396 Plan of Sanitary Sewer System.
A-397 Plan of Drainage System.
A-398 Foundation plan.
A-399 Detail of Piers.
A-405 Detail of Piers.
A-407 Excavation Plan.
A-429 Plan and Elevation Main Building.

It appears that in order to enable prospective bidders under the contract to submit their bids the plans above mentioned were furnished to them prior to the letting of the contract. One exhibit in the case was a letter from the defendant in error to plaintiff, under date of August 5, 1920, containing the following: "Under separate cover please find Drawings A-396, 397, 398, 399, 405, 407 and 429. A407 is correct for excavation on Main Building. The remainder of these drawings should be used for general information only, until such time as they are completed and checked, which will be done in ample time to avoid any delay." Plaintiff's bid was on the unit basis, so that they were to be paid at the prices named for the material used and labor performed. The amended declaration, after averring that plaintiffs were engaged as building contractors with their principal office in the city of East St. Louis, Illinois, and that defendant was a corporation engaged in the manufacture of glassware with a factory and its principal office in Alton, Illinois, then averred that defendant desiring to enlarge and improve its plant at Bridgetown, New Jersey prepared specifications and plans for the purpose of securing bids for the work desired, and furnished plaintiff with the same.

The declaration then stated in detail what was shown by such plans and specifications, and alleged that plaintiffs, after determining from said plans the amount of material and labor required submitted their bid which was accepted and the contract in question was entered into on the 24th day of August 1920; that after the execution of the contract plaintiffs went into possession of the lands and lots, mentioned

[illegible] Plan of Sanitary Sewer [illegible]
A-327 Plan of Manhole Sewer
A-328 Foundation plan.
A-329 Detail of Piers.
[illegible]-6 Detail of Piers.
A-327 Excavation Plan.
A-329 Plan and Elevation Main Building.

[illegible]

[illegible] were furnished to them prior to the letting of the contract. One exhibit is the one was a letter from the [illegible] land-out in error to plaintiff, under date of August 5, 1920, containing the following: "Under concrete cover please find [illegible]

correct for excavation on Main Building. The remainder of [illegible]

[illegible]

at the prices named for the material used and labor performed. The amended declaration, after averring that plaintiffs were engaged as building contractors with their principal office in the city of East St. Louis, Illinois, and that defendant [illegible]

[illegible]

[illegible] an average [illegible] to date [illegible] the plant at Dunellen, New Jersey produced specifications [illegible] lan for the purpose of securing bids for the work [illegible] d, and furnished plaintiff with the same.

The declaration then stated in detail what was [illegible] and specifications, and alleged that plaintiffs [illegible] from said plans the amount of material and [illegible] actual black dirt which was accepted and the [illegible] was entered into on the 26th day of [illegible] that after the execution of the contract plaintiffs [illegible] ion of the land and lots, monument

in the contract where said improvements were to be constructed and incurred a great expense for equipment, machinery, tools and appliances necessary for the work; that afterward on September 29, 1920 and on November 12, 1920, modifications of the contract were agreed to by both parties. The declaration then alleged that after the execution of the contract and commencement of work thereunder by the plaintiff's, defendant "furnished detailed drawings for a portion of the work described in said contract, plans and specifications, in conformity with section four (4) of said contract, and that plaintiffs proceeded without delay and completed said portion of said work in accordance with said contract, plans and specifications, and to the satisfaction of the defendant and the defendant accepted the work so performed by the plaintiff's and paid them the full price to which they were entitled for said portion of such work in accordance with the unit prices, providing compensation to the plaintiff's for such work."

That on April 4, 1921, defendant, without any reason or justification, notified plaintiffs that owing to business depressions and other unavoidable circumstances, they would proceed no further with the performance of the work and requested plaintiffs to place no further order for material or equipment or any work exclusive of the buildings they were then engaged on, and that when defendant was ready to proceed with the work it would notify plaintiffs; that since that time contracts had been let by defendant to other parties for portions of work covered by the contract; that while plaintiffs had at all times been ready and willing to furnish the material and perform the labor, yet defendant refused to permit them to do any more of the work they were entitled to do under the contract; that said contract was advantageous, beneficial and of great value to plaintiffs, and had they been permitted to furnish the material and perform the work according to the contract they would have made large profits amounting to the sum of $157,628.50. A plea of the --

general issue and notice of special matters of defense thereunder were filed by defendant.

On a trial before a jury a verdict was returned in favor of defendant and this writ of error was sued out to reverse the judgment entered on that verdict. Plaintiffs offered no instructions and no criticism is made of those given in behalf of defendant. It is however contended by Counsel for plaintiff that the trial court erred in rulings on admissibility of evidence and that the proof failed to sustain the verdict.

While the declaration claims damages only for the refusal of defendant to permit plaintiffs to furnish material and labor for certain buildings, claimed to be covered by the contract yet the bill of particulars furnished by the plaintiffs on motion of defendant states that damages are claimed for the refusal of defendant, "to permit the plaintiffs to furnish any material and to perform any labor necessary to the excavation, erection and completion of all plain and reinforced concrete foundations, walls, columns, floors and machinery emplacements in accordance with the contract between the plaintiffs and defendant and plans and specification made a part thereof as herein referred to in and about the following structutes included in said contract, viz:

South Producer House,
Second unit of factory building,
Third unit of factory building,

and also for failure to permit plaintiffs"to furnish all material and to perform all labor necessary to the excavation, erection and completion of all plain and reinforced concrete foundations, walls, columns, floors and machinery emplacements in accordance with the contract between the plaintiffs and defendant and the plans and specifications made a part thereof as herein referred to by permitting the plaintiffs to furnish only a portion of such labor under such contract, plans and specifications in and about the following structures included in said contract, viz:

[illegible] trial jointly in motion of opposing counsel [illegible]
[illegible] filed by defendant.

On a trial before a jury a verdict was returned in favor of defendant and this writ of error was sued out [illegible] judgment entered on that verdict. Plaintiffs [illegible] assignments and no criticism is made of those given in [illegible] defendant. It is however contended by counsel for [illegible] the trial court erred in ruling on admissibility [illegible] and that the proof failed to sustain the verdict.

While the declaration claims damages only [illegible] of defendant to permit plaintiffs to furnish materials [illegible] for certain buildings, claimed to be covered by the contract [illegible] the bill of particulars furnished by the plaintiffs [illegible] defendant states that damages are claimed for the refusal [illegible] fendant "to permit the plaintiffs to furnish, pay and perform any labor necessary to the excavation, erection, completion of all plans and reinforced concrete frame systems columns, floors and machinery emplacements in accordance contract between the plaintiffs and defendant and plans section made a part thereof as herein referred to in and following structures included in said contract

"Sixth Producer House
"Second unit of Foundry building
"Third unit of [illegible] building"

and also for failure to permit plaintiffs [illegible] and to perform all labor necessary to the said work [illegible] completion of all plans and reinforced concrete frame [illegible] columns, floors and machinery emplacements in accordance [illegible] contract between the plaintiffs and defendant and the plans [illegible] specifications made a part thereof as herein referred to [illegible] ing the plaintiffs to furnish only a portion or such [illegible] work, namely excavation [illegible]

[illegible] included in said contract [illegible]

Power house,
North producer house
Batch plant,
First unit of factory building."

In other words while the declaration claimed damages only for defendant's refusal to permit plaintiff to furnish any of the materials and work for certain buildings named therein, yet the bill of particulars, also included a claim for damages because of defendant's refusal to permit plaintiffs to furnish all the material and work for the construction of a main factory building of the general dimensions of approximately 700 feet north and south 330 feet east and west composed of three units, while defendant contended that the detail drawings provided for a factory building of only one unit which was to be 220 feet north and south by 330 feet east and west. The trial court adopted defendant's views, the holding of the court being based upon the theory that there was no binding contract between the parties until detailed drawings of each building were furnished by defendant and accepted by plaintiffs in writing under that portion of the contract which provides, "drawings of the various portions of the work will be furnished by the owner as the work progresses and accepted by the contractor in writing as a binding portion of this contract". It is further contended by plaintiffs that the plans submitted to them for the purpose of making their bid, provides for a factory building 330 X 700 feet. In this connection it should be remembered that the letter to plaintiffs in error accompanying these plans under date of August 4, expressly stated that all of those plans except A407, which was merely for excavation on the main building, "should be used for general information only until such time as they are completed and checked". It is contended by plaintiffs that plan A397 provided for the construction of a South Producer House and other buildings and showed that the factory building was to be 330 x 700 feet, but that plan was simply entitled "Plan of Drainage System" and plaintiffs' contract did not include

the drainage system. It seems that said plan A397 did show the location of different buildings as contended by plaintiffs and while no dimensions of the buildings were mentioned therein, it is claimed such dimensions could be ascertained by application of of proper skill to the interpretation os such plan. It appears from the prrof however, that these buildings were only sketched in this plan and that there were no detailed drawings of the same as provided for by the contract.

Expert witnesses in behalf of plaintiffs testified that plan A397 did show the number of buildings and buildings of the dimensions as contended by plaintiffs and testified in detail as to the amount of materials and labor required for the construction of such buildings had plaintiffs been permitted to complete same. Other expert witnesses in behalf of defendant testified that it contained only general plans concerning a drainage system with which plaintiffs had nothing to do; that it was only a general plan of contemplated enlargement in the future and didnot include such detailed drawings as would be submitted to a contractor for his guidance in the work. No detailed drawings were ever sub - mitted for the buildings whih plaintiffs contend they were not permittedto construct. It seems to be conclusively established that the only detailed drawings or working plan submitted to plaintiffs in error prior to the execution of the contract other than the plan of the Sanitary Sewer System were the plans for the construction of the First Unit of the Factory building, and that those details showed such building was to be 220 x 330 feet.

The Court refused to admit said plan A397 in evidence upon the ground that such plan did not contain the detailed drawings of the buildings referred to as provided for by the contract and that such detailed plans were never furnished, and held that there could be no completed or binding contract between the parties for any certain building or buildings until such detailed drawings were furnished to and accepted in writing by plaintiffs.

This appears to us to be the correct construction to be placed upon the portion of the contract to which it relates.

The same contention arises concerning the Power House, which plaintiff claims was to be 100 x 100 feet in dimensions. However, it is shown that plaintiff did construct a power house 50 x 50 feet for the defendant for which they were paid the sum of $4195.15. Under a supplemental agreement dated May 15, 1922 a Batch Plant was constructed by plaintiffs for a lump sum of $31000. The Batch Plant built under the supplemental contract was only one half the size of the Batch Plant claimed by plaintiffs to be shown under A397. The North Producer House was built under the general contract as was also the First Unit of the factory building, 220 x 330 feet. For all the work done both that under the general contract and under the supplemental contracts above referred to detailed drawings were furnished by defendant. These detailed drawings were all furnsihed subsequent to the date of the contract, August 24, 1920, save probably drawings A407 which as above stated covered only the excavation onthe main building as stated in defendant's letter of August 5, 1920

It also appears that the North Producer House was errected under a supplemental contract on the unit basis dated October 20, 1921, and that detailed drawings were furnished for this work.

It is further contended by plaintiffs that the evidence shows plaintiffs were prevented from furnishing all the material and work on certain other buildings for which detailed drawings were furnished and accepted. There were however introduced in evidence receipts signed by plaintiffs reciting that they are in full for work on the buildings in question or in full for final payment, and we are not disposed to disturb the verdict of the jury on this question.

Plaintiffs further insist that in any event they are entitled to recover for 421 tons of reinforcing steel which it is

contended they ordered for the job and were not permitted to use. The claim appears to be that 700 tons of reinforcing steel were furnished by plaintiff of which 278.9 tons were used and paid for, and the balance not used. The only evidence on this subject appears to be certain data taken from a letter from plaintiffs to defendant in which it is stated that plaintiffs have estimated such steel at 700 tons, but we find no proof which would justify us in disturbing a verdict of the jury on the ground the plaintiffs had not been paid for all steel furnished by them to be used in buildings covered by the contract.

In our opinion the court comitted no error in ruling upon the evidence and the proof is sufficient to sustain the verdict. No other errors are called to our attention and the judgment therefore should be and is affirmed.

AFFIRMED.

Not to be reported.

[illegible] contended they ordered for the job and were not permitted to [illegible] The claim appears to be that 700 tons of reinforcing steel [illegible] furnished by plaintiff of which 278.5 tons were used and paid [illegible] and the balance not used. The only evidence on this subject [illegible] seems to be certain data taken from a letter from [illegible] to defendant in which it is stated that plaintiffs have sold such steel at 700 tons [illegible] but we find no proof which would [illegible] us in disturbing [illegible] of the jury on the ground the plaintiffs had not been paid for all steel furnished by them to [illegible] in building covered by the contract.

In our opinion the court committed no error in [illegible] upon the evidence and the proof is sufficient to sustain the verdict. No other errors are called to our attention and the judgment therefore should be and is affirmed.

Not to be reported.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1926.

TERM NO. 8. AGENDA NO. 26.

HAZEL MILLARD, Appellee,	:	
	:	Appeal from the City Court
VS.	:	
	:	of EAST ST. LOUIS, ILLINOIS.
ARCADE FURNITURE CO., Appellant.	:	

HIGBEE, J. Appellee, Hazel Millard, brought this suit against appellant, Arcade Furniture Company, to the January Term, 1926 of the City Court of East St. Louis, to recover damages for an injury which she sustained on the 16th day of November, 1925.

The cause was tried at the January Term, 1926, of court before a jury, and resulted in a verdict for appellant. This verdict was set aside and a new trial granted. The case was again tried at the May term, 1926 of said Court and a verdict and judgment returned in favor of appellee in the sum of $3000.00. The declaration as originally filed consisted of three counts, but before the second trial the first and second counts were dismissed and the case was tried on the third count which, in substance alleges that on the 16th day of November, 1925, appellant was conducting a general retail furniture store on the ground floor and basement of a certain building on Collinsville Avenue in the City of East St. Louis; that in this store a stairway led from the ground floor to the basement as a means of access to the basement for appellant's customers; that it was the duty of appellant to keep this stairway sufficiently well-lighted for the

use of its customers; that on the day aforesaid, while appellee was exercising due care and caution for her own safety, she was using this stairway in going to the basement, and that appellant then undertook through its servant or agent to illuminate the stairway by means of a flashlight, but that appellant's servant or agent carelessly and negligently failed to light the stairway sufficiently, which stairway was then and there in a dark and poorly illuminated condition; that as a result thereof appellant fell with force and violence down the stairway to the basement breaking her right leg and sustaining other injuries. To this declaration a plea of the general issue was filed.

It appears from the evidence that on the day in question whill appellee was in the basement of appellant's store purchasing some furniture the electric lights went out. Appellee was accompanied by her three year old son and Mrs. J.J.Eddings, her sister in law. After the lights went out appellee and her party, together with appellant's salesman, McNichols, who was waiting upon appellee, returned to the upper floor through this stairway, which consisted of one straight flight of steps and led to the southwest corner of the basement. From the foo t of the stariway there was anaisle or passage-way about three feet wide leading to the right or north. After returning to the upper floor appellant sent one of its employees out to purchase flash lights, and the same when secured, were then distributed to appellant's salesmen. It would appear that other customers who were in the basement when the lights went out remained there until they were conducted upstairs by salesmen equipped with flashlights. Appellee testified that when McNichols, the salesman, was supplied with a flashlight he suggested that they return to the basement and look at some more furniture. The said salesman, however, testified that appellee suggested returning to the basement and that he objected, but upon her insistance they did return. Appellee was corroborated by her sister-in-law, that it was the

salesman who suggested they return to the basement. The testimony of appellee and her sister-in-law is that the salesman started down the stairway with the sister-in-law immediately following him and appellee with her three year old son in the rear. Appellee and her sister-in-law both testified that the stairway was very dark; that the salesman kept the flashlight directly in front of him, and when he reached the foot of the stairway turned to the right up the aisle to the north and thus left the stairway in darkness, and it was at this time that appellee fell and sustained her injuries. McNichols, testified that appellee was immediately behind him as he went down the stairway, and that he so walked and held the flashlight that it was directed back of him so as to light the stairway in front of her. He also testified that appellee was followed by her sister-in-law, and that another salesman with a flashlight in his hand was coming down the stairway back of appellee's sister-in-law.; that appellee's child began crying as they started down the stairway, and that when appellee was within two or three steps of the bottom she attempted to quiet the child, by slapping or shaking him, and it was then when she fell; that he attempted to catch her, but was unable to do so. This witness was corroborated by another salesman who testified that he was immediately following this part down the stairway.

Four grounds are presented by appellant for a reversal of this judgment as follows: (1) that appellee did not show by a preponderance of evidence she was exercising due care and caution for her own safety, just before and at the time of her injury; (2) that she did not prove that her injury was due to the negligence of appellant; (3) that the trial court erred in refusing to give four instructions offered by appellant; (4) that the verdict is excessive. It is claimed that the evidence shows appellee was not using due care and caution for her own safety for the reason it appears she knew the lights were out, and that

the stairway was dark before she started to descent the same. It is true that the evidence shows she had such knowledge of her surroundings but it must be noted that the negligence charged by appellee is not a failure to light the starway as she was descending it but the alleged negligent act on the part of the salesman in turning up the aisle to the right after he had reached the foot of the stairway, and failing to keep the flashlight so that it would shine upon the stairway. Both appellee and her sister-in-law testified that the salesman was several steps in advance of appellee who was a large woman weighing 250 pounds and that the sister-in-law was between her and the salesman. These alleged acts of the salesman was clearly something which appellee could not have foreseen as she started down the stairway. If appellee's injury was caused by the action of this salesman and not the failure of appellant to properly illuminate its stairway, the jury was justified in finding appellee was not guilty of contributory negligence if they believed her and her witnesses, as the verdict shows they did. As to appellants second contention that is that appellee failed to prove her injury was due to the negligence of appellant we are of the opinion that if her injury had been shwon to have been caused solely by the darkened condition of the stairway, this position would be well taken. If however, it was due to the action of the salesman in turning the flashlight from the foot of the stairway, the position would not be well taken. Upon both of the above questions of fact there was conflict in the testimony. Appellee and her sister-in-law swore to facts which if true, sustained appellee's allegations in her declaration of negligence on the part of the servant of appellant and due care on her part while appellant's salesman, McNichols, swore to facts testified to by appellee and her said witness, McNichols, was corroborated to a considerable extent by W. H. Symonds another salesman and Cora Lipount cashier of appellant, swore to a statement made by appellee soon after the accident which was to some extent contradictory of her testimony on the

trial. The jury saw all these witnesses and heard their testimony and were in a much better position than we are to determine, which ones were more worthy of credit. They decided the preponderance of the evidence was favorable to the plaintiff, and we do not feel that this court is in a position to over-ride the verdict of the jury in that regard.

Appellant offered seven instructions and the court refused four of them. The three instructions given did not in any manner cover the question of contributory negligence on the part of appellee, nor were any such instructions given at her instance. The first of appellant's refused instructions stated a general proposition that if one goes upon the premises of another by invitation and is injured by reason of some defect or existing dangerous condition which the injured person knew to be dangerous, damages cannot be recovered for the injury. This instruction then advised the jury that if it believed from the evidence that while appellee was in the store the electric lights ceased to burn; that appellee expressly desired to go to the basement, and that appellant procured a flashlight which but partially lighted the stairway, and that appellee knew of these conditions or had the same opportunity of knowing them as appellant; that notwithstanding such knowledge she attempted to descend the stairway and was injured while so doing, then she could not recover any damages. This instruction does not apply to the case stated by the declaration, upon which appellee must rely, which was that her fall was caused by the salesman so turning the flashlight at the foot of the stairs that what light it did give was not reflected upon the stairway. The second and third of appellant's refused instructions are along this same line and ignore this same element of this case and as all these instructions directed a verdict, it seems to us they were properly refused. "An instruction which presents a different case from that declared on, is erroneous", Schmidt v. Balling, 91 Ill. App. 388. The fourth refused instructions stated among other things, that if the jury believed from the evidence -

[illegible] in a [illegible] instruction which [illegible] to [illegible]
[illegible] which one were more worthy of credit. They decided
[illegible] preponderance of the evidence was [illegible] which [illegible]
[illegible] and we do not feel that the court [illegible] in [illegible] ion by
[illegible] ide the verdict of the jury in the record
[illegible] Appellant urged never [illegible] ions
[illegible] ned four of them. The three instructions given did not in
[illegible] er over the question of contributory negligence on
part of appellee, nor were any such instructions given at the
[illegible] The first of appellant's refused instructions [illegible]
[illegible] the [illegible] ion of [illegible]
[illegible] book [illegible] or [illegible]
condition when the injured person knew to be dangerous
cannot be recovered for the injury. This instruction
then advised the jury that if it believed from the evidence that
Alcoholic Lights ceased to

[illegible]

the railway, and that appellee's loss of time and [illegible] on
the same opportunity of knowing them as appellant; that notwith-
standing such knowledge [illegible] ted to expose the [illegible] and
injured [illegible] while so doing, then she could not recover [illegible]
This instruction does not apply to the case [illegible]
the declaration, upon which appellee must rely, which was that her
fall was caused by the sudden so turn the flashlight of the
of the a time that that light it did give was not reflected
the railway. The second and third [illegible] refused
[illegible] tions are alone this [illegible] de ignore this [illegible] element
this case and as all these instructions directed a verdict
they were properly refused. An instruction which
[illegible] differed from that declared on, is erroneous.
[illegible] 91 Ill. App. 308. The fourth refused instruction
[illegible] other things, that if the jury believed from the

appellee knew of the conditions with reference to light and notwithstanding such knowledge attempted to descend the stairway in question then the appellee "assumed whatever risk there was". This instruction was properly refused as the doctrine of assumed risk which it seems to invoke is only applicable to cases arising between master and servant. Conrad v; Springfield Ry.Co. 240 Ill. 12.

While the verdict may be somewhat high yet we do not believe that we can hold it is excessive under the proof in this case. It was shown by the evidence that appellee suffered a fracture which extended into her ankle; that she was unable to be on her feet for two months and even then was compelled to use crutches; that her ankle was still at the time of the trial swollen and painful, and that this condition may last for a year or more from the time of the injury. In the case of Meyzels v. Chicago City Ry. Co. 177 Ill. App. 534, where the injuries complained of were very similar to those shown by the evidence here, a verdict and judgment for $3000 were sustained by the Appellate Court from the First District and while the verdict in this case, in our opinion may be large, we do not feel justified in holding that it is so excessive as to warrant a reversal and we must therefore affirm the judgment.

JUDGMENT AFFIRMED.

Not to be reported.

Not to be reported.

STATE OF ILLINOIS,
APPELLATE COURT
FOURTH DISTRICT.

OCTOBER TERM, A. D. 1925

TERM NO. 11. AGENDA NO. 51.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error.	WRIT OF ERROR TO CIRCUIT COURT OF MADISON COUNTY.
VS.	
HARRY CLARK and IRWIN HATRIDGE, Plaintiss in Error.	

OPINION BY HIGBEE, J.

Plaintiffs in error, Harry Clark and Irwin Hatridge, together with Stowell Beach, were indicted in the circuit court of Madison county, Illinois, for violation of Section 1 of the Criminal code which is Section 1 of "An Act for the protection of bank depositors." All three of the defendants named in the indictment were found guilty, but a new trial was granted Stowell Beach and the case against him was afterwards dismissed. The indictment grows out of the failure of the First State and Savings Bank of Woodtiver, Illinois, and the same conditions in substance exsist in this case as exsisted in the case against these same plaintiffs in error in which an opinion was filed by this court on March 31, 1925. The verdict of guiltyas returned by the jury found each of the persons charged guilty and fixed their fine at $290.00 each, and imposed an additional penalty as to plaintiff in error Hatridge of one year imprisonment. The court entered

judgment on this verdict fining each of plaintiffs in error $290.00 and sentencing plaintiff in error Hatridge to imprisonment in the Southern Illinois Penitentiary at Chester for one year or until discharged according to law. Since the record in this case is in all substantial matters the same as the former case above referred to against these plaintiffs in error, and since nothing has been called to our attention changing our opinion as to the correctness of the opinion rendered in that case, we adopt, so far as applicable, the former opinion of the court.

The only difference between the two indictments is that in the present indictment plaintiffs in error are charged with accepting a deposit from one Emil Krauss of the sum of $145.00 on October 23, 1922, knowing that the bank was on that date insolvent. The history of the bank from the time of the accepting of the deposit in question to the closing of its doors on November 17, 1922 and during its liquidation, as shown by the record in this case, is fully set forth in the former opinion in this court, and it seems to us to be wholly unnecessary to incorporate the same in this opinion.

Plaintiffs in error devote no little portion of their argument to discussing the contention that the closing of the bank was due to unfavorable business conditio s and not to any misconduct on the part of plaintiffs in error. The cause of the insolvency of the bank and of plaintiff in error's contribution thereto are immaterial. The material issue in this case is, was the bank insolvent on the date the deposit was made, and did plaintiffs in error know of such insolvency when the deposit was accepted, and was the deposit lost to the depositor?

It is earnestly contended by plaintiffs in error that the burden was upon the people to show the insolvency of the bank on the date in question, and that the people did not meet this

burden.

In this case, as in the former one, the testimony of the witness, Slivka, is largely relied upon to establish the insolvency of the bank upon the date in question, and his testimony and other proofs on this question are substantially the same in this case as in the other. The witness, Slivka, it is true, did not testify in detail as to the investigation he made as to each note, but he did testify that he had made an investigation of the unpaid notes and was of the opinion he could arrive at their value as a whole. We are of the opinion that there was ample evidence to justify the jury in believing beyond a reasonable doubt that the bank was insolvent on the date in question, and that the plaintiff in error knew of such insolvency and there is no contention that the deposit was not lost to the depositor.

It is contended that the indictment charges that the deposit was made on October 23 while the proof shows it was made on October 27 and that the jury by the instuctions was required to find that the bank was insolvent on October 23. It appears that some of the instructions refer to the insolvency of the bank on October 23, yet most of these instructions contained the following: "It is sufficient if you believe beyond a reasonable doubt from the circumstances in evidence that the bank was insolvent at the time said deposit was so received." Further, several of the instructions offered by plaintiff in error also refer to the date in question as October 23.

Even if plaintiffs in error were in position to complain of this discrepancy, yet we are of the opinion that considering the instructions as a whole they were not prejudiced thereby.

The same complaint is made in this case as in the former,

that the verdict was improper in that it fixed the penalty. As held before, that part of the verdict may properly

that the verdict was improper in that it fixed the penalty. As held before, that part of the verdict may be properly considered as surplusage. It is also contended in this case that the judgment of the court was improper in so far as it attempted to fix the time for which plaintiff in error Hatridge should be confined to the penitentiary. This is not such an error as to necessitate a retrial of this cause as such judgment may be corrected by the trial court under the direction of this court, so as to make the prison sentence of plaintiff in error Hatridge an indeterminate one in accordance with the law. (Armstrong v. People 37 Ill. 459; Henderson v. People 165 Id. 607; People v. Boer 262 Id. 152).

The judgment will therefore be affirmed as to the plaintiff in error Harry Clark. As to plaintiff in error Irwin Hatridge the judgment will be reversed and the cause remanded with directions to the trial court to enter a proper judgment in accordance with what we have above said.

not to be reported.

verdict was improper in that it cited the penalty. In fact, that part of the verdict was properly

[illegible]

[illegible]damage. It is also contended in this case that the [illegible] of the court was improper in as far [illegible] it attempted [illegible] time for which plaintiff in error Hatridge should be [illegible] to the penitentiary. This is not such an error as to [illegible]stitute a reversal of this cause as such judgments may be [illegible]cted by the trial court upon the direction of this court, [illegible] to make the various sentences of plaintiff in error Hatridge [illegible]te one in accordance with the law. (Armstrong v. [illegible] 37 [illegible] 189; Henderson v. People 108 Ill. 607; People v. [illegible]

The judgment will therefore be affirmed as to the plaintiff in error Harry Clark. As to plaintiff in error Hatridge the judgment will be reversed and the cause remanded [illegible] action to the trial court to enter a proper judgment [illegible]dance with what we have above said.

STATE OF ILLINOIS.
APPELLATE COURT,
FOURTH DISTRICT.

MARCH TERM, A. D. 1927

TERM NO. 13. AGENDA NO. 5.

LARNER LEEDS, Appellant. VS. GLEN NADING and PAUL NADING, Appellees.	APPEAL FROM COUNTY COURT OF WABASH COUNTY.

OPINION BY HIGBEE, J.

Appellant, Larner Leeds brought suit in replevin against appellants Glen Nading and Paul Nading before a Justice of the Peace of Wabash county charging in his affidavit for replevin, that he was lawfully entitled to the possession of 200 bushels of yellow corn and that appellee wrongfully detained said goods and chattels from him. A writ of replevin was issued and duly served, a change of venue taken to another Justice of the Peace and a trial had on January 2, 1926. The Trial Justice found from the evidence that appellant was not lawfully entitled to possession of the property replevinad and ordered that appellee have and recover possession of the same. On the day of trial, a writ of Retorno Habendo was issued by the Justice. An appeal was asked for to the county court by appellant, an appeal bond execute by appellant, with a surety, which was approved and filed by the Justice. The papers in the case and transcript of the Justice of the Peace were certified by him to the county

court, the certificate bearing date of January 22, 1926.

Upon the trial in the county court appellees, by their attorneys, entered a motion in writing to quash the writ of replevin and dismiss the appeal for the following reasons:

1. The court from which this action or cause was appealed had no jurisdiction to hear and detirmine said cause, in that no demand was made by the plaintiff of the defendant or either of them for such property before suit was begun, as is by law required.

2. This court is without jurisdiction to hear and detirmine said cause, in that the matter in difference is the adjustment of partnership affairs, such matters being of the jurisdiction of a court of equity and should have been commenced in a city court or circuit court.

3. County courts have no jurisdiction to hear and detirmine questions of dissolution and winding up partnership affairs.

4. That one partner of a partnership cannot maintain an action of replevin against a co-partner during the term of such co-partnership, nor after the termination of such co-partnership until after their partnership affairs have been previously adjusted.

5. The appeal taken in the above cause was not perfected as is by law required and should be dismissed.

6. And for other and further good cause to be shown to the court.

On the hearing of the motion, the county court granted the same, dismissed the appeal, directed the clerk to issue a procedendo to the Jusitce and entered judgment against appellant for costs and he prayed for and perfected an appeal to this court.

Appellant asserts and the record sustains his claim, that appellees introduced no evidence and filed no affidavits to

support said motion.

As to the first reason assigned by appellee for the dismissal of the appeal, it must be borne in mind that a demand is not always necessary before bringing an action in replevin. Kee & Chapell Dairy Co. v. Pennsylvania Co. 291 Ill. 248; Cranz v. Kroger 22 id. 74. Whether a demand was made or not, was a question of fact which could not be taken for granted from the mere statement in the motion that no demand was made. Whether a demand was necessary would also have to be detirmined from the facts in the case and there was no proof on this subject submitted.

The second, third and fourth reasons relied on by appellees in their motion, are all based on the theory that the suit grew out of differences which arose between the parties over certain partnership affairs. There is however nothing in the record to show that any partnership ever exsisted between appellant and appellees and the court could not detirmine the question raised by points 2, 3 and 4 of the motion without proof as to whether such a partnership had ever exsisted. Point Number 5 of the motion states that the appeal from the Justice of the Peace to the county court was not perfected according to law. It appears from the transcript of the Justice and the papers filed and certified to the county court, that the appeal was prayed for, allowed and the appeal bond filed with the Justice and approved on the day of the trial. Nothing then remained to be done but for appellant to pay the fee for the filing of the transcript in the county court and for the Justice to file the same in said court. It was necessary for appellant to pay the Justice of the Peace the filing fee within 20 days after the judgment was entered. The record shows that the case was tried by the Justice of the Peace on January 2, 1926 and the certificate made by

him and attached to the transcript, was dated January 22, 1926, which would be within the proper time and shows the payment of a filing fee. It is however contended by appellees that the record does not show that appellants paid the full amount of five dollars filing fee required by law. This claim is based upon an entry in the transcript under the head of cost as follows:

Filing fees for Co.Court, paid by Larner Leeds, "3.00 -----5.00."

There is nothing in the transcript of the Justice of the Peace or elsewhere in the record to explain this item. Appellees interpret it to mean that only $3.00 of the required $5.00 was paid, while appellant insists that it shows that the full amount of $5.00 was paid as the filing fee. In the absence of any further evidence on this subject, we must assume that the Justice of the Peace did his duty and collected the full amount of the filing fee within the time required by law, for otherwise he would have had no legal authority to file the transcript and other papers in the county court, as he did.

The county court erred in sustaining the motion of appellees and dismissing the appeal from the Justice of the Peace with judgment against appellant for costs.

The judgment will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

not to be reported.